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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1081

THE LONG ISLAND COLLEGE HOSPITAL,
Petitioner,

against

NEW YORK STATE LABOR RELATIONS BOARD,

and

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED SERVICE EMPLOYEES UNION, SEIU, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	11
I—The Labor Board denied the Hospital due process of law when its Trial Examiner had access to and used secret information in the Labor Board's "confidential" file, which the Labor Board's prosecutor controlled, while denying the Hospital's counsel the right to examine that secret information. This Court should grant review to insure that state and local administrative agencies play fair with those whose conduct they are charged with regulating	11
II—The Labor Board denied the Hospital equal protection of the laws by applying one standard for determining the unit appropriate for collective bargaining to private, profitmaking hospitals and non-profitmaking educational institutions and another standard to voluntary non-profitmaking hospitals such as petitioner. This Court should grant review to insure that state and local administrative agencies treat all those within their jurisdiction rationally and with an even hand	17
Conclusion	23

INDEX TO APPENDICES

	PAGE
A—Opinion and Remittitur of the Court of Appeals	1a
B—Decision and Order of the Appellate Division, New York State Supreme Court	20a
C—Trial Examiner's Intermediate Report and Decision and Order of the New York State Labor Relations Board	26a
D—Order of the Court of Appeals Denying Motion for Reargument	81a
E—Order Granting Motion to Amend Remittitur	82a
F—Excerpts from Transcript of Hearing Before the New York State Labor Relations Board	84a

TABLE OF AUTHORITIES

PAGE

Cases:

Adelphi Hospital, 2 SLRB 266 (1939) 17
Armstrong v. Manzo, 380 U.S. 545 (1965) 14

Boineau v. Thornton, 235 F. Supp. 175 (E.D.S.C.), *aff'd*, 379 U.S. 15 (1964) 21
Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970) 16
Brownell v. Tom We Shung, 352 U.S. 180 (1956) 13

Carter v. Morehouse Parish School Board, 441 F.2d 380 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971) 15
Cooper v. Aaron, 358 U.S. 1 (1958) 20
Council 19, AFSCME v. NLRB, 296 F. Supp. 1100 (N.D. Ill. 1968) 21

Dickey v. Florida, 398 U.S. 30 (1970) 13

English v. City of Long Beach, 35 Cal. 2d 155, 217 P.2d 22 (1950) 16

Faculty Student Ass'n., 32 SLRB 453 (1969) 18
Fort Smith Light and Traction Co. v. Board of Improvement, 274 U.S. 387 (1927) 21
F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 21

Garner v. Louisiana, 368 U.S. 157 (1961) 15
Gonzales v. United States, 348 U.S. 407 (1955) 15

Hart Refineries v. Harmon, 278 U.S. 496 (1929) 20
Henry v. Greenville Airport Commission, 279 F.2d 751 (4th Cir. 1960) 20
Home Town Foods, Inc. v. NLRB, 379 F.2d 241 (5th Cir. 1967) 14
Howell Refining Co. v. NLRB, 400 F.2d 213 (5th Cir. 1968) 14

PAGE

Jencks v. United States, 353 U.S. 657 (1957) 9

Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) 13

Lawrence Hospital, 28 SLRB 552 (1965) 5
Local 134, IBEW v. NLRB (ITT Corp.), —— F.2d ——, 84 LRRM 2401 (7th Cir. 1973) 13
Long Island College Hospital v. Catherwood, 23 N.Y. 2d 20 (1968), *appeal dismissed,* 394 U.S. 716 (1969) 7

Madison Park Hospital, 2 SLRB 277 (1939) 17
Morgan v. United States, 304 U.S. 1 (1937) 13
Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (10th Cir. 1972), *cert. denied,* 412 U.S. 906 (1973) 21

New York University, 32 SLRB 425 (1969) 19
NLRB v. Savair Mfg. Co., 42 U.S.L.W. 4073 (U.S. Dec. 17, 1973) 14
NLRB v. Winchell Processing Corp., 451 F.2d 306 (9th Cir. 1971) 14
Nyack Boys School, 32 SLRB 569 (1969) 18, 19

Ohio Bell Telephone Co. v. Public Utilities Comm'n., 301 U.S. 292 (1937) 14

Park Hospital, 15 SLRB 230 (1952) 17
Park West Hospital, 15 SLRB 182 (1952) 17

Railroad Commission of California v. Pacific Gas & Electric Co., 302 U.S. 388 (1938) 13
Reed v. Reed, 404 U.S. 71 (1971) 22
Royal Hospital, 2 SLRB 273 (1939) 17
Royal Hospital, 15 SLRB 524 (1952) 17

PAGE

Shelley v. Kraemer, 334 U.S. 1 (1948) 20
Simmons v. United States, 348 U.S. 397 (1955) 15
Skinner v. Oklahoma, 316 U.S. 535 (1942) 22
Smith v. Cahoon, 283 U.S. 553 (1930) 20

United States v. Abilene & Southern Railway Co., 265 U.S. 274 (1926) 16
United States v. Nugent, 346 U.S. 1 (1953) 15
United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) 15

Constitutional Provisions and Statutes Involved

Constitution of the United States
U.S.C. Const. Amend. 14, §1 ..... 3, 12, 22

National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.* 13
Section 10(b) 7

New York State Labor Relations Act, *Labor Law* §700 *et seq.* (McKinney's 1965)
Section 706 7
Section 707 9
Section 716 7

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, The Long Island College Hospital ("Hospital") seeks review by writ of certiorari of a judgment of the Court of Appeals of the State of New York entered May 3, 1973 reversing an order of the New York State Supreme Court, Appellate Division, Second Judicial Department, entered June 5, 1972, which annulled a final order of the New York State Labor Relations Board ("Labor Board") dated June 30, 1971 directing the Hospital to bargain collectively with Local 144, Hotel, Hospital, Nursing Home & Allied Service Employees Union, SEIU,

AFL-CIO ("Local 144") as the exclusive representative of the Hospital's maintenance employees. The Court of Appeals denied the Hospital's application for reargument on October 11, 1973.

Opinions Below

The Opinion of the Court of Appeals of the State of New York is reported officially at 32 N.Y. 2d 314 and unofficially at 298 N.E.2d 614 and 345 N.Y.S. 2d 449 (App. A, *infra*). The Court of Appeals' order denying reargument is reported officially at 33 N.Y. 2d 744 and is set forth in Appendix D, *infra*. The Court of Appeals entered an order on December 28, 1973, amending its remittitur to specify that it considered and rejected the Hospital's contentions under the Constitution of the United States. This order has not been officially reported and is set forth in Appendix E, *infra*. The opinion of the Appellate Division of the New York Supreme Court is reported officially at 39 App. Div. 2d 913 and unofficially at 333 N.Y.S. 2d 23 (App. B, *infra*). The Labor Board's decision and order and the Trial Examiner's Intermediate Report is reported officially at 34 SLRB 324 (App. C, *infra*).

Jurisdiction

The judgment of the Court of Appeals was entered on May 3, 1973. Its order denying the Hospital's timely motion for reargument* was entered on October 11, 1973. This

* Section 500.9(b) of the Court of Appeals' Rules of Practice requires that a notice of motion for reargument "be served not later than 90 days after the appeal has been decided." The Hospital served its notice of motion for reargument together with the papers supporting the motion on August 1, 1973, less than 90 days after May 3, 1973, the date the Court of Appeals decided the appeal.

Court has jurisdiction to review the judgment herein by writ of certiorari under Section 1257(3) of the Judicial Code, 28 U.S.C. §1257(3).

Questions Presented

1. Whether the New York State Labor Board denied the Hospital procedural due process of law in violation of the Fourteenth Amendment to the Constitution of the United States when, during the trial on the Labor Board's unfair labor practice complaint and over the Hospital's objections, the Board's Trial Examiner who decided the case read and used secret information in the Board's "confidential" file, which the Labor Board's prosecutor also used and controlled, while denying the Hospital access to that file and the material it contained.

2. Whether the Labor Board, by applying one standard for determining the unit appropriate for collective bargaining in cases involving profitmaking hospitals and non-profitmaking educational institutions, and another standard in this case to the Hospital, a non-profitmaking hospital, when no rational basis for a distinction exists, denied the Hospital the equal protection of the laws and thereby violated the Fourteenth Amendment to the Constitution of the United States.

Constitutional Provisions and Statutes Involved

This case involves the application of the United States Constitution, Amendment XIV, Section 1, which provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are cit-

izens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The Hospital is a voluntary, non-profitmaking, teaching hospital in Brooklyn, New York.

This case began on July 1, 1963, when Local 144 petitioned the Labor Board to certify it as the exclusive collective bargaining representative of "all [of the Hospital's] non-professional employees." It later amended its petition to describe the bargaining unit it was seeking to represent as all the Hospital's "service" and "maintenance" employees.

On October 15 and 23 and November 1, 1963 the Labor Board conducted hearings on Local 144's amended petition to enable the Board to determine whether a unit composed of the Hospital's service and maintenance employees constituted an appropriate unit for purposes of collective bargaining or whether a broader unit of "all non-professional employees" was the smallest unit that could be found appropriate.

On March 26, 1964, while Local 144's representation case was pending before the Local Board, but after the close of hearings, the Maintenance Division of the Building

and Construction Trades Council of Greater New York, AFL-CIO ("Maintenance Division") filed a petition with the Labor Board for certification as the exclusive collective bargaining representative of a unit limited to the Hospital's maintenance employees. The Labor Board entertained Maintenance Division's petition, reopened the hearings in Local 144's case, and directed a consolidated hearing on the two petitions.

Unlike its decisions in other cases involving maintenance employees at hospitals, the Labor Board did not find, as it should have, that most of the Hospital's "maintenance employees" were handymen and that "their skills and compensation are substantially less than that of skilled craftsmen." *Lawrence Hospital*, 28 SLRB 552, 554 (1965). Instead, despite the fact that both the Hospital and Local 144 favored placing the Hospital's maintenance employees in the same bargaining unit as the Hospital's service employees, the Labor Board gave these unskilled maintenance employees a chance to vote themselves into a separate bargaining unit, finding that the maintenance employees were a homogeneous group of skilled employees despite substantial evidence in the record to the contrary. In so doing, the Labor Board, without rational basis, applied a different standard for appropriate collective bargaining units at voluntary, non-profitmaking, teaching hospitals than it applied in contested cases involving profitmaking hospitals and non-profitmaking, educational institutions where it always placed maintenance employees, whether skilled or unskilled, in the same broad bargaining unit as service employees.

Relying on its erroneous findings and contrary to its previous decisions, the Labor Board directed not one but two elections for the Hospital's service and maintenance employees; one election for the service employees, the other a "self-determination" election in which the maintenance employees were to vote separately on a complicated, confusing three question ballot—one question dealing with unit placement, and two questions dealing with union representation. The service employees rejected Local 144 at the election by a vote of 309 to 151—better than 2 to 1.

Although a majority of the maintenance employees voting in the election did not "signify a desire to bargain separately", the Labor Board tallied the maintenance employees' ballots separately from those of the service employees, found that Local 144 received 24 votes out of 47 ballots cast, a *one vote* margin, and declared Local 144 the bargaining representative of a separate unit of maintenance employees. When the Hospital objected to the Labor Board's complicated and confusing ballot, to the way the Labor Board tallied the ballots, and to conduct by Local 144 both before and during the election that interfered with the maintenance employees' freedom of choice, the Labor Board conducted an informal investigation, put the information it obtained during that investigation in its "confidential" file, denied the Hospital a hearing on its objections and, on December 28, 1964, certified Local 144 as the exclusive collective bargaining representative of the maintenance employees.

From 1964 forward, the Hospital repeatedly demanded that Local 144 file, and that the Labor Board process, an

unfair labor practice charge so that the Hospital would obtain, in the only way it could, judicial review of the 1964 certification. *Long Island College Hosp.* v. *Catherwood,* 23 N.Y. 2d 20 (1968), *appeal dismissed,* 394 U.S. 716 (1969). Instead, Local 144, with the cooperation and support of the Labor Board, sought to enforce its certification, and at the same time avoid judicial review, by invoking the then newly enacted fact-finding and compulsory arbitration procedures of Section 716 of the New York State Labor Relations Act ("Act"), *Labor Law* §716 (McKinney's 1965), which the Act prescribes for economic disputes but not for legal ones. Local 144 efforts to avoid judicial review were unsuccessful and held to be improper. *Long Island College Hosp.* v. *Catherwood, supra.*

Thereafter, on May 6, 1969, five years after the Labor Board certified it, Local 144 was forced to initiate unfair labor practice proceedings in an attempt to enforce its now stale Labor Board certification by filing a refusal to bargain charge against the Hospital under Section 706 of the Act. Unlike the six months limitation period found in Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. §160(b), the New York State Act is silent and the Labor Board rejected the Hospital's contention that laches barred its processing the charge and issued a refusal to bargain complaint.

On various dates between June 11 and August 15, 1969, the Labor Board held hearings on the complaint. In point of fact, the hearing was not an "unfair labor practice" hearing. Rather, recognizing obvious due process problems, the Labor Board gave the Hospital in 1969 a hear-

ing on the objections to the election the Hospital had filed in 1964 at which time the Board had rejected the objections and certified the Union without a hearing (App. F, *infra* pp. 94a-97a). Since the Board had already publicly rejected the objections in 1964, the hearing it gave the Hospital in 1969 on these objections proved not to be a fair one. Throughout these hearings the Trial Examiner—the decider of the case—continually referred to, read and used the Labor Board's "confidential" file, which contained materials and information supplied to the Board in 1964 during its informal investigation of the Hospital's objections in the representation case, even though the material in the file was not part of the record in the case, and the Hospital had no chance to examine the file or to rebut it. The Trial Examiner and the Labor Board's prosecutor controlled that file throughout the case. Hospital counsel never saw it, although he demanded a chance to look at it and repeatedly objected when the Trial Examiner dipped into the file for documents (App. F, *infra* pp. 84a-93a). The Trial Examiner had access to the file when he made his decision, but because the Hospital did not know what the file contained, it had no opportunity to challenge, question or impeach the evidence, if it were legal evidence, in the file.

Further, over objection the Trial Examiner permitted Richard Leary, the Labor Board's Labor Elections Supervisor, whose testimony was crucial on the Hospital's objections concerning the form and language of the ballot, Local 144's conduct in the polling area on the day of the election, and the way the ballots were tallied, to examine the "confidential" file while he was testifying, but the Trial Examiner denied Hospital counsel the right to examine that file to impeach Mr. Leary's testimony.

Finally, after Mr. Leary testified at another hearing involving a different hospital that he always prepares a memorandum for the Board when there are objections to an election, the Hospital moved to reopen the hearing in this case to permit Hospital counsel to ask Mr. Leary whether he had prepared such a memorandum in this case, the Trial Examiner in this case having refused to permit Mr. Leary to answer that question. The Labor Board, realizing the constitutional infirmities of its Trial Examiner's ruling, sought to correct his error by placing Mr. Leary's memorandum in evidence, but it refused to permit the Hospital to cross-examine Mr. Leary concerning the memorandum (App. C, *infra* pp. 40a-43a) and thereby denied the Hospital the fair hearing that *Jencks* v. *United States*, 353 U.S. 657 (1957) guarantees it.

On August 28, 1970, the Trial Examiner issued his intermediate report (App. C, *infra* pp. 48a-80a) (i) upholding the Labor Board's rejection of the Hospital's objections to the election (ii) recommending that the Hospital cease and desist from refusing to honor Local 144's certification and otherwise to bargain with it. Overruling the Hospital's exceptions to that intermediate report, on June 30, 1971, the Labor Board adopted the intermediate report "as the opinion of the Board" (App. C, *infra* p. 27a), although it added its own exegesis.

On October 29, 1971, the Hospital petitioned the Appellate Division, Second Department, under Section 707(1) and 716(6)(a) of the Act praying that the Appellate Division review the Labor Board's order directing the Hospital to bargain with Local 144 and set that order aside.

On June 5, 1972 the Appellate Division annulled the Labor Board's bargaining order on the law, denied the Labor Board's cross-petition to enforce its bargaining order and directed the Labor Board to conduct a new election among the Hospital's maintenance employees (App. B, *infra*).

However, the Appellate Division erroneously failed to set aside the Labor Board's determination that the maintenance employees would constitute a separate bargaining unit if they voted for a separate unit in a self-determination election. When the Board and Local 144 appealed, the Hospital cross-appealed, *inter alia,* to bring the Labor Board's invalid bargaining unit determination before the Court of Appeals and to correct the Appellate Division's error in upholding the Labor Board in this regard.

On May 3, 1973, the New York Court of Appeals reversed the Appellate Division, and reinstated the Labor Board's bargaining order and cross-petition for enforcement of that order holding, *inter alia,* that the Appellate Division correctly affirmed the Board's determination that the Hospital's skilled maintenance employees constituted an appropriate bargaining unit.

Although the Hospital clearly and expressly raised and argued the two constitutional issues presented to this Court before the Appellate Division and before the Court of Appeals, neither court discussed the constitutional issues in their respective opinions.

Similarly, the Hospital raised its Fourteenth Amendment arguments when it moved the Court of Appeals for

reargument. However, on October 11, 1973 the Court of Appeals entered an order, without opinion, denying the Hospital's motion for reargument (App. D, *infra*).

On November 5, 1973, the Hospital moved the Court of Appeals to recall and amend its remittitur to the Appellate Division, Second Judicial Department, to show that the Court of Appeals had considered and rejected the contentions the Hospital raised under the Constitution of the United States, which the Hospital is now asking this Court to review. The Court of Appeals entered an order granting this motion on December 28, 1973 (App. E, *infra*).

Reasons for Granting the Writ

I

The Labor Board denied the Hospital due process of law when its Trial Examiner had access to and used secret information in the Labor Board's "confidential" file, which the Labor Board's prosecutor controlled, while denying the Hospital's counsel the right to examine that secret information. This Court should grant review to insure that state and local administrative agencies play fair with those whose conduct they are charged with regulating.

In 1964 after it conducted a self-determination election among the Hospital's maintenance employees, the Labor Board, instead of holding a hearing on the Hospital's objections, conducted an informal investigation and summarily denied the Hospital's objections. The Labor Board placed the information it gathered during its investigation in its "confidential" file.

When the Labor Board issued its complaint alleging that the Hospital was committing an unfair labor practice by refusing to bargain with Local 144, the Hospital preserved its objections to the election by pleading them as affirmative defenses to the Labor Board's complaint. In 1969, the Labor Board held a hearing on the complaint and on the Hospital's affirmative defenses. In point of fact the Labor Board gave the Hospital a hearing on its objections to the election five years after the Hospital was entitled to it. Moreover, this delayed hearing was tainted by the Trial Examiner's use of secret information contained in the Labor Board's "confidential" file, by his refusal to give Hospital counsel the opportunity to examine the contents of that file, by the Labor Board prosecutor's control of the file, and by the fact that a key witness the Labor Board employed was also permitted to examine the file while he was testifying (App. F, *infra* pp. 84a-93a).

The Trial Examiner's star chamber-like refusal to permit counsel for the Hospital to examine the "confidential" file squarely raises the question of whether the Hospital received the full and fair hearing that the Constitution of the United States requires. U.S. Const. Amend. 14 §1. The decision of the New York Court of Appeals that the Trial Examiner's conduct did not deprive the Hospital of its rights under the Constitution of the United States (App. E, *infra* pp. 82a-83a) departs from the holding of this Court in many cases.

We urge the Court to take this case in order to insure that the procedures of the nation's ever growing number of state and local administrative agencies will be fair and

regular and will not deny to persons within their jurisdictions "the rudimentary requirements of fair play" that parties to administrative proceedings of a quasi-judicial nature must be afforded. *Morgan* v. *United States*, 304 U.S. 1, 15 (1937).

This Court has held that these "rudimentary requirements" include a fair and open and impartial hearing, *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953); *Morgan* v. *United States*, 304 U.S. 1 (1937), and that a fair and open hearing "must be accorded as an inexorable safeguard." *Railroad Commission of California* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 393 (1938).

A fair and open hearing was particularly important in this case. First, the five year delay in permitting the Hospital to prove its objections made it essential that the Hospital know all the evidence upon which the Labor Board relied five years earlier in overruling its objections so that the Hospital could rebut it. *Dickey* v. *Florida*, 398 U.S. 30 (1970). Second, unlike the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*, the New York State Labor Relations Act does not separate the prosecutory and adjudicatory functions of the Labor Board so that the Labor Board prosecutor's control of the file and a Labor Board employee's examining it while he was testifying were acts of the Labor Board itself that compelled the Trial Examiner to permit Hospital counsel to examine the file so that he could rebut what the Labor Board was relying on. *Local 134, IBEW* v. *NLRB (ITT Corp.)*, —— F.2d ——, 84 LRRM 2401 (7th Cir. 1973) (the court holding the Labor Board's order tainted and unenforceable where

the Board commingled the functions of hearing officer and prosecutor). Third, on the trial of objections to an election, the cumulative effect of each objection is crucial, particularly where, as here, Local 144's margin of victory was just one vote. *NLRB* v. *Savair Mfg. Co.*, 42 U.S.L.W. 4073 (U.S. Dec. 17, 1973); *NLRB* v. *Winchell Processing Corp.*, 451 F.2d 306, 310 (9th Cir. 1971); *Howell Refining Co.* v. *NLRB*, 400 F.2d 213, 218 (5th Cir. 1968); *Home Town Foods, Inc.* v. *NLRB*, 379 F.2d 241, 244 (5th Cir. 1967).

When the Labor Board's Trial Examiner denied counsel for the Hospital the right to examine the contents of the "confidential" file that he had before him during the trial, which file the Labor Board's prosecutor had free access to, and which a Labor Board employee examined while he was testifying, the Trial Examiner destroyed the inexorable safeguard of a fair hearing and deprived the Hospital of its right to due process of law. *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n.*, 301 U.S. 292 (1937).

In *Ohio Bell Telephone Co., supra,* this Court made it crystal clear that, where as here, the Trial Examiner used, over the protest of the Hospital, "information secretly collected and never * * * disclosed," he deprived the Hospital of "the fair hearing essential to due process." 301 U.S. at 300.

Furthermore, the Trial Examiner's access to and use of such information deprived the Hospital of a hearing conducted in a "meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). The use of secret material therefore made it impossible for the Hospital to submit rebuttal evidence, since it was not apprised of all

the evidence the Trial Examiner had before him when he rendered his decision. *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956).

The right to be informed of all the evidence to be weighted by the trier of fact is basic to due process in administrative proceedings. *Cf. Gonzales* v. *United States*, 348 U.S. 407 (1955); *Simmons* v. *United States*, 348 U.S. 397 (1955); *United States* v. *Nugent*, 346 U.S. 1 (1953).

When an administrative agency such as the Labor Board makes a ruling based upon information "which a party has not been allowed to confront or rebut" the ruling "is one which denies due process." *Carter* v. *Morehouse Parish School Board*, 441 F.2d 380 (5th Cir.), *cert denied*, 404 U.S. 880 (1971).

Like the petitioners in *Garner* v. *Louisiana*, 368 U.S. 157, 173 (1961), where this Court held that "unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon," the Hospital in this case has gone through all the motions of presenting its case without ever knowing all the evidence on which the Labor Board relied when it ordered it to bargain with Local 144.

Clearly then, the Trial Examiner's "reliance upon evidence considered *in camera* as the basis for decision [was]

fundamentally inimical to due process." *Briscoe* v. *Kusper,* 435 F.2d 1046, 1057 (7th Cir. 1970); *cf., United States* v. *Abilene & Southern Railway Co.,* 265 U.S. 274 (1926); *English* v. *City of Long Beach,* 35 Cal. 2d 155, 217 P. 2d 22 (1950).

Therefore, this Court should conclude that the Trial Examiner's and the Board's conduct deprived the Hospital of a fair hearing and violated its rights under the Fourteenth Amendment. Otherwise, the hearing it received was only a hearing in form but not in substance.

State and local administrative agencies that conduct quasi-judicial proceedings continue to increase in number and importance. Fair conduct at their hearings is essential to our free society. Hence, this Court should grant review in this case and should reverse the New York Court of Appeals' holding that the conduct of the Labor Board's Trial Examiner did not deny the Hospital due process of law. This is the way this Court may insure that all persons within the jurisdiction of state and local administrative agencies receive the fair hearing during quasi-judicial proceedings that the United States Constitution guarantees them.

II

The Labor Board denied the Hospital equal protection of the laws by applying one standard for determining the unit appropriate for collective bargaining to private, profit-making hospitals and non-profitmaking educational institutions and another standard to voluntary non-profitmaking hospitals such as petitioner. This Court should grant review to insure that state and local administrative agencies treat all those within their jurisdiction rationally and with an even hand.

In 1964, the Labor Board found that a small unit of the Hospital's employees, separate from the vast majority of the Hospital's other blue collar employees, was appropriate for collective bargaining despite the obvious fragmentation and over-compartmentalization of the Hospital's workforce that such a unit creates. But in contested cases involving proprietary hospitals and non-profit educational institutions, the Labor Board has never found that a separate unit of maintenance employees was appropriate.

The Labor Board's unit decisions involving private proprietary hospitals and educational institutions avoid fragmentizing employees into multiple bargaining units. In contested cases involving those institutions, it has not found separate units of maintenance employees to be appropriate. In its decision involving private proprietary hospitals, the Labor Board has always found a combined service *and* maintenance unit to be *the* appropriate unit of hourly paid non-professional employees. See, *e.g.*, *Royal Hosp.*, 15 SLRB 524 (1952); *Park Hosp.*, 15 SLRB 230 (1952); *Park West Hosp.*, 15 SLRB 182 (1952); *Madison Park Hosp.*, 2 SLRB 277 (1939); *Royal Hosp.*, 2 SLRB 273 (1939); *Adelphi Hosp.*, 2 SLRB 266 (1939).

In its decisions in contested cases involving non-profit educational institutions, the Labor Board has gone even further, indicating a strong preference for an overall unit that includes not only service and maintenance employees, but clerical employees as well. See, *e.g., Nyack Boys School,* 32 SLRB 569 (1969); *Faculty Student Ass'n.,* 32 SLRB 453 (1969). Thus, in *Faculty Student Ass'n., supra,* the Labor Board, rejecting the petitioning union's request for a separate unit of food service employees, found the only appropriate unit to be an all-employee unit that included, apart from the food service employees, typists, bookkeepers, a press operator, an assistant bookstore manager, cashiers, a shipping and receiving clerk and a maintenance man. Their interests, the Labor Board said, are "akin to those to the employees we have included in the unit." 32 SLRB at 461. The Board rejected the request for a separate unit notwithstanding that (i) each group had separate immediate supervisors and only "over-all" supervisors in common; (ii) they had different duties, qualifications and skills; (iii) some of the employees worked in a separate location some twenty miles distant; and (iv) so far as the decision shows, there was no interchange among employees. It said:

> "The common personnel policies and practices applicable to all employees of the Employer, and the common over-all administration and supervision, warrant a finding that its food service employees alone do not constitute an appropriate bargaining unit. Rather, a realistic determination here is that all the Employer's employees including the relatively small number of service employees [93 employees], here constitute a single unit. Accordingly, we reject Petitioner's request for a unit limited only to food service

employees, and find generally that all of the Employer's employees constitute the appropriate unit." *Id.* at 459.

And in *Nyack Boys School*, 32 SLRB 569 (1969), the Labor Board rejected the petitioning union's request for a unit of maintenance and kitchen employees, holding instead that the only appropriate unit would be an all-employee unit that would include, besides the maintenance and kitchen employees, other service employees and a clerical employee.

The Labor Board expounded the policy underlying those rulings in *New York University*, 32 SLRB 425 (1969), where it said, in language equally applicable to hospitals and to institutions that, like this Hospital, are both educational institutions and patient care facilities:

> "At the very least, * * * proliferation of bargaining units would impose an unnecessarily heavy and repetitive collective bargaining burden upon non-profitmaking and quasi-public colleges and universities, which must depend substantially for their income upon the contributions and continued interest of the public. In this context, education is a quasi-governmental function. Accordingly, as a matter of general policy and in the public interest, we do not deem it desirable or necessary to compartmentalize educational institutions into numerous small bargaining units anymore [sic] than is clearly and congently required by the totality of the facts and circumstances presented. In reaching this determination, we have duly and fully weighed and evaluated the twin statutory objectives of encouraging collective bargaining and maintaining stability in labor relations." 32 SLRB at 430.

This language is equally applicable to voluntary hospitals like The Long Island College Hospital, which are both

health care facilities and educational institutions where nurses and fledgling physicians (*i.e.*, interns, residents and fellows) are trained.

The prohibitions of the Fourteenth Amendment extend to state action that deprives any person of equal protection of the laws. *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). The Fourteenth Amendment also extends to acts of the state's political subdivisions and its administrative agencies like the Labor Board that serve a public purpose and are supported by public funds. *Henry* v. *Greenville Airport Commission*, 279 F.2d 751 (4th Cir. 1960).

Thus, by applying one unit standard to private profitmaking hospitals and non-profitmaking educational institutions, and another standard to voluntary, non-profitmaking hospitals, where no rational basis for distinction exists, the Labor Board has denied to voluntary hospitals in general, and to The Long Island College Hospital in particular, the equal protection of the laws, and thereby violated the Constitution of the United States. The New York Court of Appeals' holding that the Labor Board did not deprive the Hospital of the equal protection of the laws is not in accord with the decisions of this Court.

Concededly, the Equal Protection Clause does not prohibit classification. *Hart Refineries* v. *Harmon*, 278 U.S. 496 (1929). However, "the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary." *Smith* v. *Cahoon*, 283 U.S. 553, 566 (1930). When the Labor Board held that it would apply standards to voluntary, non-profitmaking

hospitals different from those it applied to profitmaking hospitals and to non-profitmaking educational institutions, it denied equal protection of the laws to the former, including the Hospital herein, unless it had a rational basis for the distinction. *Council 19, AFSCME* v. *NLRB*, 296 F. Supp. 1100 (N.D. Ill. 1968) (NLRB, when it attempted to limit its jurisdiction to nursing homes operating for profit by refusing to assert jurisdiction over non-profit nursing homes created an arbitrary distinction and violated the due process clause of the United States Constitution); *Fort Smith Light and Traction Co.* v. *Board of Improvement*, 274 U.S. 387 (1927). Absent such a rational basis the Labor Board's action "is just such arbitrary disparity under state law which is proscribed by the Equal Protection Clause of the Fourteenth Amendment." *Boineau* v. *Thornton*, 235 F. Supp. 175, 179 (E.D.S.C.), *aff'd*, 379 U.S. 15 (1964). *Accord, Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973); *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412 (1920).

As this Court stated in *F. S. Royster Guano Co.* v. *Virginia, supra*:

> "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the states from resorting to classification. * * * But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 253 U.S. 412 at 415.

In the instant case, there exists no rational basis for applying one bargaining unit standard to private, profitmaking hospitals and non-profitmaking educational institutions, and another standard to voluntary, non-profitmaking hospitals. Private, profitmaking hospitals and voluntary non-profitmaking hospitals perform the same primary function and employ service and maintenance employees who do the same type of work. Educational institutions and voluntary, teaching hospitals both perform an educational function and employ service and maintenance employees who also do the same type of work. Hence, when the Labor Board applied different unit standards to private hospitals and educational institutions on the one hand, and voluntary hospitals on the other without a rational basis for distinguishing between them, the Labor Board denied to The Long Island College Hospital the equal protection of the laws contrary to the Constitution of the United States. *U.S. Const., Amend. 14; Reed* v. *Reed,* 404 U.S. 71, 76 (1971); *F. S. Royster Guano Co.* v. *Virginia, supra.* Otherwise, "the equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." *Skinner* v. *Oklahoma,* 316 U.S. 535, 542 (1942).

This Court should grant review in this case to prevent state and local administrative agencies from irrationally, arbitrarily and unfairly classifying and regulating persons within their jurisdictions contrary to the Constitution of the United States.

Conclusion

This Court ought to grant a writ of certiorari to review the judgment of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals, State of New York

No. 600

STATE OF NEW YORK

COURT OF APPEALS

In the Matter of the LONG ISLAND COLLEGE HOSPITAL, Respondent-Appellant, *v.* NEW YORK STATE LABOR RELATIONS BOARD, Appellant-Respondent; LOCAL 144, HOTEL, HOSPITAL, NURSING HOME AND ALLIED SERVICE EMPLOYEES UNION, SEIU, AFL-CIO, Intervenor-Appellant-Respondent.

Argued March 20, 1973; decided May 3, 1973.

Chief Judge FULD. In 1963, Local 144, Hotel, Hospital, Nursing Home & Allied Service Employees Union filed a representation petition with the New York State Labor Relations Board seeking certification as the exclusive bargaining representative of service and maintenance employees of Long Island College Hospital. Following hearings, the board directed two elections among the employees involved. One was among the service employees; they did not select a bargaining representative and so much of the petition as involved them was dismissed. The second election was conducted among the hospital's skilled maintenance employees. They voted (1) to bargain as a separate unit, limited to such employees and (2) to be represented for the purpose of collective bargaining by the union.

On the objections to the elections filed by both the union and the hospital, the board conducted an informal investi-

gation. It concluded that the objections were insufficient on their face and, in any event, that there was insufficient evidence to warrant a hearing. The board thereupon (in December, 1964) certified Local 144 as the exclusive bargaining representative of the skilled maintenance employees. The hospital disputed the board's certification on various grounds and refused to bargain with the union. Instead of filing an unfair labor practice charge against the hospital on that ground under the State Labor Relations Act (Labor Law, §704, subd. 6), the union invoked the mediation, fact-finding and compulsory arbitration proceedings of section 716, which the Legislature had made available to hospital employees when, in the course of bringing nonprofitmaking hospitals under the jurisdiction of the board in 1963 (§715), it enacted legislation prohibiting strikes by such employees (§713). The hospital thereupon brought an action which in effect sought to restrain proceedings under section 716. When the matter came before our court in 1968, we decided in favor of the hospital, holding that the proper procedure was for the union to file a refusal to bargain charge and that the arbitration order of the Industrial Commissioner was to be stayed until the union's certification had been judicially reviewed and found valid and enforceable. (*Long Is. Coll. Hosp.* v. *Catherwood,* 23 N Y 2d 20, app. dsmd. 394 U. S. 716.)

In accordance with our decision in that case (23 N Y 2d 20, *supra*), Local 144 filed its unfair labor practice—refusal to bargain—charge with the board, and thereupon a formal complaint was issued against the hospital. At the hearings which followed, the hospital not only attacked the board's original certification order of 1964, determining that the

skilled maintenance workers constituted an appropriate bargaining unit, but interposed new matters concerning, among other things, alleged improprieties in the conduct of the election. After thorough consideration of these issues, the board adhered to its earlier decision and entered an order, dated June 30, 1971, which directed the hospital to cease and desist from refusing to bargain with Local 144 and extended its certification for one year from the date of its order or from the completion of any judicial review of that order.

On appeal, the Appellate Division, by a divided court, annulled the board's order and directed a new election (39 A D 2d 913). Although the court unanimously upheld as proper (1) the board's decision to have a self-determination election only among the hospital's skilled maintenance employees, (2) the board's use of a multi-question ballot and (3) its method of tallying the votes, a majority refused to confirm the board's certification and its bargaining order on several grounds: the ballot should have been bilingual and not solely in English; there were insufficient Spanish-language notices of election for distribution to the maintenance workers; and the union's "Special Edition" of its publication contained inaccuracies and was distributed at a time when the hospital could not make an effective reply.

I. *Appropriateness of Unit*

The Appellate Division was eminently correct insofar as it affirmed the board's determination that the hospital's skilled maintenance employees constituted an appropriate bargaining unit. The board has an exceedingly broad dis-

cretion in fixing appropriate bargaining units. (See, e.g., *Matter of Metropolitan Life Ins. Co.* v. *New York State Labor Relations Bd.*, 280 N. Y. 194, 209; *Pittsburgh Glass Co.* v. *Board*, 313 U. S. 146, 165-166; *Packard Co.* v. *Labor Bd.*, 330 U. S. 485, 486, 491.) As the Supreme Court declared in the *Packard Co.* case (330 U.S., at p. 491), "The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed." Indeed, when this case was previously before us, we stated in no uncertain terms that "questions as to representation, including any issue as to the appropriate bargaining unit, call particularly for the expert judgment of the Labor Board. As we wrote in *Matter of Levinsohn Corp.* (*Joint Bd. of Cloak, Suit, Skirt & Reefer Maker's Union*) (299 N. Y. 454, 466), in speaking of the powers of the National Labor Relations Board to deal with representation issues—and this applies with equal force to the State Labor Board —'The Federal courts have uniformly recognized that because of the complexity and difficulty of the problem of designating the *appropriate unit*, the power to make the decision has been delegated exclusively to the expert judgment of the board which has wide discretion in making the determination' " (23 N Y 2d, at pp. 34-35).

Since the determination of an appropriate bargaining unit "is more nearly 'legislative' than 'adjudicative' " (*Utica Mut. Ins. Co.* v. *Vincent*, 375 F. 2d 129, 134, cert. den. 389 U. S. 839), the judicial review to which it will be subjected is narrow and circumscribed. The question posed

is this: is the determination "arbitrary" or "capricious," not is it supported by substantial evidence. (See *Matter of Metropolitan Life Ins. Co.* v. *New York State Labor Relations Bd.*, 280 N. Y. 194, 209, *supra; May Stores Co.* v. *Labor Bd.*, 326 U. S. 376, 380; *Foreman & Clark, Inc.* v. *National Labor Relations Bd.*, 215 F. 2d 396, 405-406, cert. den. 348 U.S. 887; *N. L. R. B.* v. *Tennessee Packers, Inc., Frosty Morn Div.*, 379 F. 2d 172, 182, cert. den. 389 U. S. 958).

It is for the board to establish "in each case" an "employer unit, multiple employer unit, craft unit, plant unit, or any other unit" (Labor Law, §704, subd. 2). Although it may well be that more than one unit might properly be found appropriate, it is settled by numerous cases, decided under the National Labor Relations Act—and there is no reason for a different rule under the State act—that "the Board has the responsibility of making [that] determination." (*General Instrument Corp.* v. *N. L. R. B.*, 319 F. 2d 420, 423, cert. den. 375 U. S. 966; see, also, *Corrie Corp. of Charleston* v. *N. L. R. B.*. 375 F. 2d 149, 154; *Packard Co.* v. *Labor Bd.*, 330 U. S. 485, 491, *supra; Overnite Transp. Co.* v. *N. L. R. B.*, 327 F. 2d 36, 39.) The record before us reveals the board's care in determining that the hospital's skilled maintenance employees was the appropriate bargaining unit. Not only did the board conduct a general public hearing concerning the problems involving appropriate bargaining units at hospitals, during which the opinions of both employers and unions in the field were received but also, in several individual representation proceedings—including one involving the very hospital before

us—it conducted lengthy hearings at which the parties were afforded an opportunity to present evidence relating to unit issues.[1]

Without merit is the hospital's argument that the unit selected may improperly fragment the hospital into numerous small units. Not only does the statute not preclude "fragmentation" but it declares that, in establishing an appropriate unit, the guide is that the board "insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise * * * effectuate the policies of this article" (Labor Law, §705, subd. 2). This is accomplished at times by establishing a small bargaining unit limited to those employees who constitute a homogeneous group and desire the benefits of collective bargaining. (See, e.g., *Matter of Liberty Maimonides Hosp.*, 29 NYSLRB 464, 466-467; *Matter of Carson C. Peck Mem. Hosp.*, 32 NYSLRB 323, 326-327.) Actually, the board's practice in allowing skilled maintenance employees

1. After noting that, where a separate unit of skilled maintenance employees has been sought, it found "weighty considerations both for, and opposed to, the establishment of such a separate unit," the board went on to say—quoting from *Matter of Wyckoff Hgts. Hosp.* (27 NYSLRB 75, 82-83)—" 'On the one hand, they are a homogeneous group of skilled employees having relatively higher earnings and no interchange with the service employees. * * * On the other hand, there is our policy against over-compartmentalization of hospitals into numerous small bargaining units, and prior Board decisions * * * finding maintenance and service units appropriate in hospitals. * * * We find that these factors are equally balanced. Under these circumstances, especially the fact that the engineer-maintenance employees perform types of services identified with traditional trades and crafts, we believe that the as yet unexpressed desires of these employees should be determinative. Accordingly, as we have done in similar situations, we shall ascertain, by a self-determination election, the desires of the engineer-maintenance employees as to whether they prefer to bargain in a separate unit, or in a larger unit including the service employees.' "

in hospitals to form a separate bargaining unit if they wish to do so, far from constituting over-compartmentalization, has avoided more serious fragmentation into numerous smaller units since, under the mandatory craft unit provision of subdivision 2 of section 705, each skilled craft, such as plumbers, painters and carpenters, could have demanded and could have been included in a separate unit. Accordingly, the board's practice, resulting in the establishment of a separate bargaining unit of skilled maintenance employees, was fully justified and, certainly, may not be stamped as either arbitrary or capricious.

II. *Conduct of Election*

Nor, in our view, is there any valid basis for the hospital's attack on the conduct of the election—viz., the form of the ballot, the tabulation of the votes and the union's election campaign literature.

Section 705 (subd. 4) of the State Labor Relations Act provides that "The board shall have power to determine who may participate in the [representation] election and to establish the rules governing any such election". The board is an important governmental agency vested with the exclusive authority and responsibility of determining the procedure to be used in conducting representation elections, and its determination should not be set aside where there is substantial evidence to support its findings of fact. (See, e.g., *Matter of Roosevelt Hosp.* v. *New York State Labor Relations Bd.*, 27 N Y 2d 25, 32; *Railway Clerks* v. *Employees Assn.*, 380 U. S. 650, 667; *Labor Bd.* v. *Tower Co.*, 329 U. S. 324, 330; *Labor Bd.* v. *Waterman S. S. Co.*, 309 U. S. 206, 226; *N. L. R. B.* v. *Olson Bodies, Inc.*, 420 F. 2d

1187, 1189). As the Federal Court of Appeals observed in the *Olsen Bodies* case (420 F. 2d 1187, 1189, *supra*), "The conduct of representation elections is the very archtype of a purely administrative function. with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse."

A. *Language, Form and Tally of the Ballots*

The hospital urges that the ballot should not have been only in English since some of the voters were Spanish-speaking and that the form of the ballot—its inclusion of three questions to be voted on—was complex and confusing.

1. *Language of ballot*

In the light of the principles stated above, there can be no doubt that the board was justified in concluding that the voters had sufficient command of the English language to understand the ballot. In the first place, no maintenance employee testified, or even complained, that he was unable to read English or to understand the ballot. And, in the second place the hospital actually agreed at a pre-election conference that the ballot for the maintenance employees need only be in English. In view of this, we do not consider of any moment the fact—mentioned in the Appellate Division's opinion (39 A D 2d, at p. 913)—that the union's "Special Edition" of its publication, "Bulletin" (see, *infra*, p. 326 *et seq.*), was partially printed in Spanish. As is apparent, the board's determination is founded on substantial evidence, and no warrant exists to nullify the agency's conclusion that the English-language ballot was proper.

Appendix A

2. *Form of ballot*

The entire Appellate Division explicitly stated that "we do not find the board's decision to employ the multi-question ballot to be arbitrary or inherently confusing" (39 A D 2d, at p. 913).[2] As bearing on the propriety of that determination, we note that the type of ballot now before us was adopted by the board in 1964 (see *Matter of Wyckoff Hgts. Hosp.*, 27 NYSLRB 75, 86, *supra*) and has since been utilized in numerous representation elections. Of high significance is the fact that not a single voter in this case had informed the board that he was confused or did not understand the meaning of the ballot. Moreover, as the board's decision recites, notices of the election were posted and sample ballots distributed—thereby enabling the employee-voter to familiarize themselves with its form—and the hospital itself "conducted about 10 meetings, attendance at which was compulsory, during which employees were thoroughly instructed in the mechanics of voting. The meetings were conducted by Donald D. Rowe, a communica-

2. The three questions which the voters were asked to answer, each with a single "x" mark, are these:

"1. Do you want a separate bargaining unit limited only to maintenance of plant an [sic] engineering department employees? (to be answered 'Yes' or 'No').

"2. If there is a separate unit of maintenance of plant and engineering department employees, do you then desire to be represented for the purposes of collective bargaining by Maintenance Division [no longer a party to these proceedings] or by Local 144, or by neither?

"3. If there is a combined unit of maintenance of plant and engineering department employees and service employees, do you then desire to be represented for the purpose of collective bargaining by Local 144? (to be answered 'Yes' or 'No')."

tions consultant retained by [the Hospital], who testified at the meetings '* * * there was a great deal of emphasis on what the election would be all about, what the procedures would be, how they would vote, why it was important for them to vote, what the vote would determine, all the details of the election.'" And, continued the board, "[w]e are satisfied that the employees had full knowledge of the nature and meaning of the ballot, and had no reasonable basis for being confused." That conclusion is manifestly supported by substantial evidence.

3. *Tally of ballots*

The Appellate Division also rejected the hospital's contention that the board's method of counting the votes was improper, and there can be no doubt of the correctness of that conclusion. The first question on the ballot asked whether the skilled maintenance employees wanted a separate bargaining unit (see, *supra*, p. 325, n. 2). Of 47 skilled maintenance workers who went to the polls, 21 voted in favor of a separate unit and 5 against. Twenty ballots were left blank and 1 was challenged and, in accordance with its long-settled practice, the board excluded from the tabulation those 21 ballots. Since the valid votes were 21 "yes" to 5 "no," the board certified that a majority desired the separate unit of skilled maintenance employees. This was entirely and unimpeachably correct. The board was not required—contrary to the hospital's insistence—to treat the blank ballots as negative votes, that is, to regard the "non" votes as "no" votes. The board was fully justified in counting only validly marked ballots and

not taking into account blank, void or challenged ballots in arriving at a final tabulation.

It follows from what has already been written that the board's tally of the vote on question 2 (see, *supra*, p. 325, n. 2) is equally immune from successful attack. On that question, 24 of the 47 maintenance employees who went to the polls voted in favor of Local 144, 4 in favor of the other named bargaining representative and 16 for "neither." It is apparent, therefore, that Local 144 won by a majority of 4. In any event, though, even if the blank and challenged votes had been counted against the union, it still would have had a majority of one and, by that token, was entitled to certification as the exclusive bargaining representative. (Labor Law, §705 [subd. 1]; see also, *Matter of Roosevelt Hosp.* v. *New York State Labor Relations Bd.*, 27 N Y 2d 25, 32, *supra; Labor Bd.* v. *Tower Co.*, 329 U. S. 324, *supra; N. L. R. B.* v. *Olson Bodies, Inc.*, 420 F. 2d 1187, *supra.*)

4. *Distribution of union's "Special Edition"*

The hospital objects to the union's distribution to its service and maintenance employees, on the evening of July 20, 1963, about a day and a half before the election, of a "Special Edition" of its "Bulletin." After a detailed analysis and discussion, both the trial examiner and the board overruled the objection. However, the Appellate Division majority, as one of its reasons for reversing the board, stated that "the 'Special Edition' contained inaccuracies and was distributed at a time when, in our opinion, petitioner could not make an effective reply" (39

A D 2d, at p. 913). Justice SHAPIRO, in dissent, took a different view, and we agree with him that "it is not [the board's] function 'to censor every sentence or phrase of campaign rhetoric, or to try to fix the precise amount of allowable hyperbole.' Its conclusion that Local 144's 'Special Edition' was not likely to substantially mislead the voters when taken in context with all that preceded and followed is supported by substantial evidence. Further, the evidence indicates that petitioner made a deliberate decision not to reply to the 'Special Edition' even though it had both the ability to publish a reply and the factual material available with regard to most, if not all, of the alleged misrepresentations" (p. 914).

It is well to bear in mind that the pre-election campaign was long and hard fought by both Local 144 and the hospital. During the week immediately preceding the election, each of the parties issued charges and countercharges; leaflets and circulars were distributed; telegrams and answering telegrams were sent out. In a series of 9 or 10 meetings called by the hospital administration, the hospital stressed the expense of joining the union. At several of the meetings—attended by the hospital's communications specialist (Donald Rowe)—reference was made to contracts that the union had with other hospitals, and extracts were read from the agreements then in effect with Jamaica Hospital and Doctors Hospital.

It was in this context that the union sent a telegram to the hospital on the evening of July 20 and commenced distribution shortly thereafter of a single-page leaflet setting forth the telegram and the "Special Edition" of its "Bul-

letin."[3] Most of the claimed misrepresentations related to wage and fringe benefits contained in the Jamaica Hospital and Doctors Hospital contracts. Although those agreements had long been in possession of the hospital, instead of issuing a statement to its employees, pointing out the specific areas in which it claimed the union had misstated the terms of those contracts, the hospital sent an answering telegram and commenced distribution, at about midnight, of a flyer to all employees setting forth its telegram.[4] The hospital's administrator, its communications specialist and its attorney discussed the union's "Special Edition" at about midnight on July 20. However, the hospital did not prepare or distribute any additional response. It seems clear that it was satisfied with what it had already done; having informed the employees that the Doctors Hospital and the Jamaica Hospital contracts did not support the union's claims with respect to them, the hospital obviously decided that the employees had sufficient information to make a reasoned judgment when they came to vote.

It is our judgment that substantial evidence supports the board's finding that the "Special Edition" did not mislead the voters. As bearing on this, it is of considerable

3. The union's telegram and leaflet recited, in part: "Local 144 is prepared to debate the issues before workers and let them decide who is telling the truth. Local 144 is prepared to bring copies of its contracts to such debate to prove accuracy of its statements. Suggest debate to be held Tuesday July 21 at 1 p.m."

4. The hospital's response included the following: "Your organizers have been handing out anti propaganda to our employees for more than a year now. Tomorrow, July 21, have them distribute copies of Local 144's contracts with Doctors and Jamaica Hospitals. *Failure to do so will in the eyes of our employees be positive proof that you are hiding important facts from them.*" (Emphasis in original.)

significance that, although the pre-election campaign literature, including the "Special Edition," went to both the skilled maintenance employees and the service employees, the latter group—consisting of some 550 eligible voters as compared with 55 employees in the maintenance group—voted overwhelmingly against the union. Moreover, as already stated, since the hospital had in its possession the detailed facts with respect to two hospital contracts, it could have presented them to the employees to counteract what it believed to be misstatements in the "Special Edition." Having chosen not to avail itself of that opportunity, the hospital is hardly in a position now to urge that the election be set aside on the ground that it had no adequate opportunity to answer the union's "Special Edition." (See, e.g., *N.L.R.B.* v. *Louisville Chair Co.,* 385 F. 2d 922, 927, cert. den. 390 U. S. 1013.)

In concluding that the "Special Edition" was distributed at a time when the hospital could not make an effective reply, the Appellate Division substituted its judgment for that of the board. This, of course, is impermissible where, as here, the board's findings of fact are supported by substantial evidence. (See *Matter of Roosevelt Hosp.* v. *New York State Labor Relations Bd.,* 27 N Y 2d 25, 32, *supra; Matter of Jernigan* v. *New York State Labor Relations Bd.,* 300 N. Y. 482; *Matter of Stork Rest.* v. *Boland,* 282 N.Y. 256, 267, 274.) In short the board applied to the case before us its standard, unquestionably reasonable, that misrepresentations in pre-election campaigns would be a ground for setting aside the election only where they are material, involve facts exclusively within the

knowledge of the party, are reasonably expected to have a significant impact on the voters and no opportunity exists for the challenging party to rebut the alleged misrepresentations. (See, e.g., *Matter of Millard Fillmore Hosp.*, 28 NYSLRB 525, 527.) And, having regard for the entire pre-election campaign, its findings that Local 144 was not guilty of such misrepresentations or inaccuracies as to warrant setting aside the election and that the hospital deliberately chose not to reply, despite the opportunity to do so, are supported by substantial evidence.

It is only necessary to add that there is no basis whatever for criticism of the union for its asserted delay in failing to file an unfair labor practice complaint (39 A D 2d, at p. 913). As our court unequivocally stated in the *Roosevelt Hospital* case (27 N Y 2d 25, 34, *supra*), "Delays occasioned by the union's exercise of what it reasonably believed to be its right under the statute [to invoke the mediation, fact-finding and compulsory arbitration proceedings of section 716] did not call for a redetermination of its status as a representative any more than would delays resulting from the slowness of administrative action or from an employer's pursuit of his judicial remedies in seeking court review of the board's certification. [Cases cited.]" Moreover, as the court went on to observe in that case (27 N Y 2d, at p. 35)—and it is equally applicable in the present one—"What occurred here * * * is not likely to occur again, now that the procedure to be followed in this type of situation has been definitively set forth in this court's *Long Island College Hospital* decision (23 N Y 2d 20, *supra*) and in the Legislature's recent clarifying amendments to section 716 of the Act (L. 1969, ch. 526, §§2, 3)."

Appendix A

The order of the Appellate Division should be reversed, with costs, the board's bargaining order reinstated and the cross petition for enforcement of that order granted in its entirety.

Judges BURKE, BREITEL, JASEN, GABRIELLI, JONES and WACHTLER concur.

Order reversed, etc.

Appendix A

Remittitur

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of May in the year of our Lord one thousand nine hundred and seventy-three, before the Judges of said Court.

WITNESS,

The Hon. STANLEY H. FULD, Chief Judge, Presiding.

JAMES M. FLAVIN, Acting Clerk.

Remittitur May 3, 1973

Appendix A

Remittitur

No. 600 72

In the Matter of

the Petition of the Long Island College Hospital,
Respondent-Appellant,

to review and set aside a Decision and Order of the New York State Labor Relations Board,
Appellant-Respondent,

Local 144, Hotel, Hospital, Nursing Home & Allied Service Employees Union, SEIU, ALF-CIO,
Intervenor-Appellant-Respondent.

Be It Remembered, That on the 28th day of December in the year of our Lord one thousand nine hundred and seventy-two, the New York State Labor Relations Board, the appellant-respondent, and Local 144, Hotel, Hospital, Nursing Home & Allied Service Employees Union, SEIU, ALF-CIO, the intervenor-appellant-respondent in this cause, came here unto the Court of Appeals, by Norbert M. Phillipps and Vladeck, Elias, Vladick & Lewis, their respective attorneys, and filed in the said Court, Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Long Island College Hospital, the respondent-appellant in said cause, afterwards appeared in said Court of Appeals by Kelley, Drye, Warren, Clark, Carr & Ellis, its attorneys, and also filed a Notice of Appeal.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Martin D. Heyert, of counsel for the petitioner-appellant, and by Mr. Norbert M. Phillipps

of counsel for the appellant Board and by Judith P. Vladeck, of counsel for the intervenor-appellant, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs, the Board's bargaining order reinstated and the cross-petition for enforcement of that order granted in its entirety.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

Therefore, it is considered that the said order be reversed, with costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

James M. Flavin
Acting Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, May 3, 1973.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

James M. Flavin
(Seal) Acting Clerk

APPENDIX B

Opinion of Appellate Division, Second Department

616 E.

In the Matter of The Long Island College Hospital, petitioner v. New York State Labor Relations Board, respondent.

Local 144, Hotel, Hospital, Nursing Home and Allied Service Employees Union, SEIU, AFL-CIO, intervenor-respondent.

Proceeding under sections 707 (subd. 4) and 716 (subd. 6, par. [a]) of the Labor Law to review an order of the New York State Labor Relations Board, dated June 30, 1971, which (1) directed petitioner to cease and desist from refusing to bargain with the intervenor-respondent (Local 144) as the exclusive bargaining representative of petitioner's full-time and regular part-time employees in the maintenance of plant and engineering departments (excluding certain specified employees) and (2) extended the Board's December 28, 1964 certification of Local 144 for one year from the date of said order or from the completion of any judicial review of the order, in which proceeding the Board cross-petitioned for enforcement of the order.

Order annulled, on the law, cross petition denied and a new election by the subject employees directed, without costs.

In our opinion, the Board's decision to have a self-determination election by the subject employees was proper and cannot be disturbed (Labor Law, §705, subd. 2). Further, we do not find the Board's decision to employ the multi-question ballot to be arbitrary or inherently confusing or that the method of tallying the votes was improper. However, Local 144's "Special Edition" of its newspaper was

partially in Spanish; the service worker ballot was bilingual; there was insufficient Spanish-language notices of elections for distribution to the maintenance workers; 20 maintenance worker ballots were blank as to Question 1, the self-determination question; Local 144 received only 24 affirmative votes out of 47 ballots on Question 2; the service workers overwhelmingly rejected Local 144; and the "Special Edition" contained inaccuracies and was distributed at a time when, in our opinion, petitioner could not make an effective reply.

Under these circumstances, and in view of the prior proceedings in which petitioner found itself enmeshed by virtue of Local 144's long-delayed failure to file an unfair labor practice complaint (see Long Is. Coll. Hosp. v. Catherwood, 23 N Y 2d 20, app. dsmd. *sub. nom.* Ottley v. Long Is. Coll. Hosp., 394 U.S. 716), we find that the certification and the order under review were not supported by substantial evidence and were contrary to law and that a new election should be had. We leave the manner of election to the Board (see Labor Law, §705).

Hopkins, Acting P.J., Martuscello, Latham and Brennan, JJ., concur.

Dissenting Opinion

Shapiro, J., dissents and votes to dismiss the petition and grant the cross-petition, with the following memorandum:

I am of the view that the Board did not abuse its broad discretion with regard to election procedures and that its finding that Local 144 had not improperly interfered with

the conduct of the election was supported by substantial evidence.

The Trial Examiner found, and the Board agreed, that all of the voters had a sufficient command of the English language to understand the ballot. Further, petitioner had agreed in advance of the election that the ballot for maintenance employees need only be in English. Hence, it is of no moment that the "Special Edition" published by Local 144, which was intended for service as well as maintenance employees, was partially in Spanish or that there were insufficient Spanish-language notices of election. Significantly, no maintenance employee testified that he was unable to read English or to understand the ballot.

The Board's practice of counting only validly marked ballots is sound and does not afford a basis for setting aside its determination. The appearance of 20 blank votes as to Question 1 does not afford a basis for finding that a substantial number of maintenance employees did not understand the ballot, as only two blank votes were cast in answer to Question 2. The fact that the service workers rejected Local 144 has no relevance to the outcome of the vote cast by the maintenance employees.

As the Board noted in its decision, it is not its function "to censor every sentence or phrase of campaign rhetoric, or to try to fix the precise amount of allowable hyperbole." Its conclusion that Local 144's "Special Edition" was not likely to substantially mislead the voters when taken in context with all that preceded and followed is supported by substantial evidence. Further, the evidence indicates that petitioner made a deliberate decision not to reply to the "Special Edition" even though it had both the ability to publish a reply and the factual material available with regard to most, if not all, of the alleged misrepresentations.

Appendix B

Local 144 was certified as collective bargaining representative of the maintenance department employees 7½ years ago. It has not yet functioned in that capacity. The nature of the objections to the election are not such as should compel us to set aside the Board's determination. In the absence of serious abuses Board-conducted elections should serve to settle controversies concerning representation and not have the limited effect of a minor skirmish preceding a greater battle to take place in the courts.

As the Board's findings and conclusions are fully supported by substantial evidence, this court may not substitute its judgment for that of the Board (Matter of Roosevelt Hosp. v. New York State Labor Relations Bd., 27 N Y 2d 25, 32).

June 5, 1972

Appendix B

Appellate Division's Order Dated June 5, 1972

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 5, 1972.

Hon. James D. Hopkins, Acting Presiding Justice
Hon. M. Henry Martuscello)
Hon. Henry J. Latham)
Hon. J. Irwin Shapiro)
Hon. Arthur D. Brennan) Associate Justices

[Same Title]

The above named The Long Island College Hospital, petitioner, having instituted this proceeding in this court under sections 707 (subd. 4) and 716 (subd. 6, par. [a]) of the Labor Law, by a petition verified October 29, 1971, to review an order of the New York State Labor Relations Board, dated June 30, 1971, which (1) directed petitioner to cease and desist from refusing to bargain with the intervenor-respondent (Local 144) as the exclusive bargaining representative of petitioner's full-time and regular part-time employees in the maintenance of plant and engineering departments (excluding certain specified employees) and (2) extended the Board's December 28, 1964 certification of Local 144 for one year from the date of said order or from the completion of any judicial review of the order; in which proceeding the Board by answer and cross-petition, verified November 18, 1971, having cross petitioned

for enforcement of the order; the proceeding having been argued by Martin D. Heyert, Esq., of counsel for petitioner; by Norbert M. Phillipps, Esq., of counsel for respondent Board, and by Judith P. Vladeck, Esq., of counsel for intervenor-respondent; due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof; it is:

ORDERED that the order is hereby annulled, on the law, cross petition denied and a new election by the subject employees directed, without costs.

HOPKINS, Acting P.J., MARTUSCELLO, LATHAM and BRENNAN, JJ., concur.

SHAPIRO, J., dissents and votes to dismiss the petition and grant the cross-petition, with dissenting memorandum.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

APPENDIX C

Decision and Order

NEW YORK STATE

LABOR RELATIONS BOARD

34 SLRB No. 48

Case No. SU-43142

In the Matter of

THE LONG ISLAND COLLEGE HOSPITAL

and

LOCAL 144, HOSPITAL AND ALLIED SERVICE EMPLOYEES UNION, SEIU, AFL-CIO

On August 28, 1970, Oscar Forster, Esquire, Trial Examiner, issued his Intermediate Report herein, a copy of which is attached hereto and made a part hereof. He found that Respondent had engaged in, and is engaging in, unfair labor practices as alleged in the complaint. Copies of the Intermediate Report were duly served upon all parties. On November 2, 1970, Respondent filed exceptions thereto, and thereafter filed a brief.

On November 12, 1970, Respondent filed a motion to reopen the hearing. The Board's litigation attorney and the Union's attorney filed affidavits in opposition to the motion. On December 3, 1970, the Board denied the motion (Decision No. 12933). On December 15th, Respondent filed a motion to reconsider this denial. For reasons discussed below, the Board denies Respondent's motion for reconsideration.

Appendix C

Respondent also excepts, or repeats its exceptions, to all the rulings, findings and administrative decisions made by the Board from July 1, 1963, when the Union filed its representation petition in Case No. SE-37117, to date. We have reviewed the entire record of these proceedings and the motions and papers filed therein and hereby affirm all findings and decisions heretofore made. We have also reviewed the rulings made by the Trial Examiner at the hearing herein and, with one exception to be discussed below, we find no prejudicial error therein and affirm these rulings.

Upon its consideration of the entire record, the Trial Examiner's Intermediate Report and the exceptions thereto and brief, the Board accepts the recommendations of the Trial Examiner and adopts his discussion of the evidence in the Intermediate Report as the opinion of the Board herein, with the following additional comments:[1]

A. The Representation Proceeding

1. *The Appropriate Bargaining Unit*

Respondent contends that the Board departed in this case from its traditional practice of finding a unit of service and maintenance employees appropriate by permitting the skilled maintenance employees to determine whether or not they desire to bargain in a separate unit.

The Board set forth its policy with respect to this issue when first confronted with it in Wyckoff Heights Hospital, 27 SLRB 75, 80-83, and again in the representation proceed-

1. Because of the special circumstances herein, Respondent will not be directed to post a notice to its employees. (See Roosevelt Hospital, 32 SLRB 398, 412).

ing herein, 27 SLRB 405, 410-412. Since that time we have, upon proper request, directed self-determination elections among similar skilled maintenance employees at numerous hospitals.[2] Significantly, virtually all of these have chosen to bargain as a separate unit.

2. *Consolidation of Petitioners of Local 144 and Maintenance Division*

In its exceptions to the Trial Examiner's Intermediate Report, Respondent contends that Maintenance Division of the Building & Construction Trades Council, herein called Maintenance Division, should not have been permitted to "intervene" in the representation proceeding because its application was not timely.

Maintenance Division did not make application to intervene in Case No. SE-37117 then pending before the Board,[3] but had filed its own petition in Case No. SE-38062 for an election in a unit of skilled maintenance employees, as dis-

2. See, for example, The Hospital for Special Surgery, 27 SLRB 455; South Nassau Communities Hospital, 28 SLRB 291; St. Luke's Hospital of Newburgh, N. Y., 29 SLRB 254; Roosevelt Hospital, 29 SLRB 378 and 29 SLRB 457; St. Luke's Memorial Hospital Center, 30 SLRB 345; The Society of the New York Hospital, 29 SLRB 283, and 33 SLRB No. 21; The University Hospital of New York University Medical Center, 30 SLRB 259; Mercy Hospital of Buffalo, 31 SLRB 347; Buffalo General Hospital, 31 SLRB 342; Booth Memorial Hospital, 31 SLRB 407. In addition, several such elections have been conducted upon consent of the parties.

3. In any event, Section 41 of the Board's General Rules and Regulations, while permitting intervention, does not require that in every case a motion to intervene be denied for failure to comply with the directions of the Rule. Rather, the matter is left to the sound discretion of the Trial Examiner. The usual practice is to be liberal in allowing intervention in representation proceedings, particularly when the best interests of all parties, including the affected employees, will best be served thereby.

tinct from the service and maintenance unit originally sought by Local 144, the Union involved in this proceeding. No Decision and Direction of Election had as yet been issued upon the petition of Local 144. Since two unions were seeking representation in conflicting and overlapping bargaining units in the same institution, the Board, in the exercise of its discretion, ordered the proceedings consolidated.[4] The Board thereby afforded to all interested parties an opportunity to present evidence on the issues involved, and made available to the affected employees the broadest possible choice.[5]

In a matter so vitally affecting the public interest, the Board need not always adhere literally to its procedural rules concerning the timeliness of applications, but may seek to protect the interests of all parties, including the employees. Where the substantive rights of individuals are not prejudiced, procedural rules may be relaxed when the ends of justice and equity so require.[6] The Board acts in the public interest, not in the vindication of private rights.[7]

Respondent was in no way prejudiced by what occurred here. If the Board had denied the motion of Maintenance

4. Board's General Rules and Regulations, Section 42.

5. Section 705 (4) of the Act provides: "The board shall have power to determine who may participate in the election * * *"

6. Matter of Lake Placid Club v. Abrams, 6 AD 2d 469, aff'd 6 NY 2d 857; N.L.R.B. v. Monsanto Chemical Co., 205 F.2d 763.

7. Act, Section 700; N. Y. S. L. R. B. v. Holland Laundry, Inc., 294 N. Y. 480, 495; Amalgamated Utilities Workers v. Con. Ed. Co., 309 U.S. 261, 270; N. L. R. B. v. Raytheon Company, 398 U.S. 25; N. L. R. B. v. Federal Engineering Co., 153 F. 2d 233, 234; Olin Industries v. N. L. R. B., 192 F. 2d 799; N. L. R. B. v. Albritton Engineering Co., 340 F. 2d 281, 286.

Division to intervene, and Local 144 had lost the election in the larger unit as it did, Maintenance Division could then have proceeded with its own petition—or filed a new one—seeking a unit limited to skilled maintenance employees. The procedure actually followed by the Board avoided unnecessary duplication and repetition of hearings and elections, by combining all in a single proceeding.

In the instant case, the public interest required a consolidated hearing in order that all the parties interested might have the opportunity to adduce evidence on the issues to be resolved by the Board. By holding the consolidated hearing and by directing the elections, the Board gave the voters a full opportunity to express their preferences not only between units but also between competing unions.

B. Affirmative Defenses in the Unfair Labor Practice Proceeding Relating to the Election

In its answer in this unfair labor practice proceeding, Respondent, as some of its affirmative defenses, repeated the allegations made in its original election objections in the representation proceeding.

The Board had dismissed those objections administratively without a hearing because of insufficient supporting data. Section 17 of the Board's General Rules and Regulations provides that, upon the filing of objections to an election, the Board "may direct oral argument to be heard before it, or direct that hearings be held before a Trial Examiner, or otherwise investigate or make its determination with respect to the objections * * *." The primary

purpose of a formal hearing is to resolve any conflicting factual disputes upon which dispositions of the underlying issues depends. When, however, there is no substantial material issue of fact presented, the Board, in its discretion, may dispense with a hearing.[8] Here the Board had determined that the facts alleged and supporting data submitted were not sufficient to warrant a hearing, and dismissed the objections.[9]

Nonetheless, at the hearing herein the Trial Examiner, in the exercise of his discretion, permitted Respondent to introduce evidence in support of these affirmative defenses. Under the special circumstances presented in this case, we affirm that ruling. Respondent was thereby afforded an opportunity to offer evidence in support of its original election objections. Like the Trial Examiner, we find that the evidence adduced does not support the objections. Upon the basis of the record before the Board at the time it dismissed the election objections, as confirmed by the present record, we adhere to our administrative determination dismissing the objections without a hearing.

1. *The Form of the Ballot in the Self-Determination Election*

Respondent contends that the ballot was in English only, whereas some of the voters were Spanish-speaking. As the Trial Examiner points out, all the voters had a sufficient

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8. N.L.R.B. v. Capitan Drilling Co., 408 F. 2d 676; N.L.R.B. v. Louisville Chair Co., 385 F. 2d 922, 926, cert. den. 390 U.S. 1013.

9. Dec. No. 11210.

command of the English language to understand the ballot.[10] In fact, all the employees were required to pass an examination in English in order to obtain their jobs.

Respondent also asserts that the form of the ballot was complex and confusing. Notices of the election were posted and sample ballots distributed, thereby familiarizing the employee-voters with the form of the ballot. Respondent itself conducted about 10 meetings, attendance at which was compulsory, during which employees were thoroughly instructed in the mechanics of voting. The meetings were conducted by Donald D. Rowe, a communications consultant retained by Respondent, who testified that at the meetings "* * * there was a great deal of emphasis on what the election would be all about, what the procedures would be, how they would vote, why it was important for them to vote, what the vote would determine, all the details of the election, * * *" We are satisfied that the employees had full knowledge of the nature and meaning of the ballot, and had no reasonable basis for being confused.[11] This same type of ballot has been used in many other hospital elections, not only among skilled maintenance employees, but also when the craft or the professional proviso of Section 705(2) of the Act has been invoked.

We find no merit in Respondent's contentions with respect to the form of the ballot.

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10. Marriott-In-Flite Services Division v. N.L.R.B., 417 F. 2d 563, cert. den. 397 U.S. 920, and other cases cited by Respondent are not applicable. They deal with employees who could not read English but were required to use English ballots.

11. N.L.R.B. v. Lowell Corrugated Container Corp., 431 F. 2d 1196; N.L.R.B. v. Bayliss Trucking Corp., 432 F. 2d 1025; Craft Mfg. Co. v. International AUW., AFL-CIO, 122 N.L.R.B. 341.

Appendix C

2. *Conduct of the Union Before the Election*

Two election campaigns were being conducted simultaneously both by the Union and by Respondent, in the maintenance unit and in the service unit. On July 22, 1964, the Union lost the election in the service unit, but received a majority of the votes in the maintenance unit. The Union filed objections to the election in the service unit, and Respondent, in the maintenance unit. After a thorough investigation, the Board dismissed the objections filed by both parties without a hearing.[12]

As the record amply demonstrates, both Respondent and the Union carried on a vigorous campaign during the weeks immediately preceding the election. There were numerous charges and countercharges, meetings conducted by Respondent at which attendance was compulsory, leaflets and circulars distributed by both sides, telegrams, answering telegrams, and an anonymous letter purportedly sent by someone representing management. It is within the context of this vigorous and verbose campaign that the alleged misrepresentations made by the Union in its special bulletin of July 20th, two days before the elections, must be examined and appraised. The advantages and disadvantages of unionism were clearly a major campaign issue. Respondent stressed the cost of joining the Union and made every effort to call the attention of the employee-voters to the payment of dues and to any other alleged disadvantages of unionism. The Union countered by showing wage and salary gains achieved under Union contracts with other

12. Dec. No. 11221 (Union's objections), and Dec. No. 11210 (Respondent's objections).

hospitals. Respondent replied by urging employees to beware of "Union bosses, shady deals."

To support its contention that the election should have been set aside because of alleged misrepresentation in the Union's literature, Respondent relies upon certain federal Circuit Court of Appeals decisions.[13] These hold that the misrepresentations involved were so material that the desires of the employees could not be determined from an election; that the misrepresentations came from a party who had special knowledge or was in an authoritative position to know the true facts; and that the other party did not have sufficient time or opportunity to correct the misrepresentations before the election. This line of cases relied upon by Respondent has been criticized by legal scholars.[14] In any event, many of the factors relied upon by the courts are not present here.

In the case before us, both sides distributed flyers simultaneously on the topic dealing with the contract.[15] The Union did not have exclusive knowledge of the provisions of the contracts which became an issue in the election campaign. They were readily available to, if not already in the possession of, Respondent. Although Respondent eventually decided not to reply directly to the Union's state-

13. N.L.R.B. v. Trancoa Chemical Corp., 303 F.2d 456; Gallenkamp Stores Co., v. N.L.R.B., 402 F.2d 525; N.L.R.B. v. Bata Shoe Co., 377 F.2d 821, cert. den. 389 U.S. 917.

14. See, for example, Derek C. Bok: THE REGULATION OF CAMPAIGN TACTICS IN REPRESENTATION ELECTIONS UNDER THE NATIONAL LABOR RELATIONS ACT, 78 Harvard Law Review 38, 82-92.

15. See Union's Exhibit #2 distributed by Respondent and Board's Exhibit #6E distributed by the Union.

ment, it did in fact issue a flyer which, because of its almost simultaneous distribution, served as a rebuttal.[16]

It is not the role of the Board to censor every sentence or phrase of campaign rhetoric, or to try to fix the precise amount of allowable hyperbole.[17] It is within our province at most to determine whether the successful party acted in such an excessive manner under all the circumstances as unfairly to influence the voters and thus deprive them of their freedom of choice. The controlling question is not whether the Union's special bulletin was in and of itself erroneous, but whether, taken in context with all that preceded and followed, it was reasonably likely to substantially mislead the voters.

Among the crucial considerations in such an appraisal is whether or not Respondent had an opportunity to reply.[18] The record here shows that the top hospital executives were present and available at an all-night session on the night of July 20th when the distribution of the Union's special bulletin began. There was still time to distribute an answer on the following day. Respondent's witness Rowe testified that, after discussion, it was decided not to respond. As one court observed when confronted with a similar situation: "Having deliberately by-passed its opportunity to reply, the Respondent cannot now contend that the Union campaign material, which was refutable, prevented the ex-

16. Union's Exhibit #2. Buffalo General Hospital, 29 SLRB 33, 34-35.

17. Millard Fillmore Hospital, 28 SLRB 525, 527.

18. Millard Fillmore Hospital, 28 SLRB 525, 527 and cases there cited.

ercise of a free choice by its employees in the election of their bargaining representative.'"[19]

There are Circuit Court of Appeals decisions contrary to those relied upon by Respondent which are equally or more persuasive.[20] In related fields the United States Supreme Court has emphasized that the public policy of the First Amendment guaranteeing the right of free speech is to encourage full and free discussion of matters of public interest without the restraining fear that some tribunal will later sit in judgment upon the alleged falsity of certain statements which had been made in the course of such public discussion.[21] The primary consideration is to guarantee a free and open discussion by all interested parties of all relevant facts without fear of a later ex post facto inquisition into the minute details of that discussion.[22]

Accordingly, in the context of the entire vigorous campaign conducted by both parties, we find that the statements made by the Union in its special bulletin of July 20th could not reasonably be expected to have had a significant or an

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19. N.L.R.B. v. Louisville Chair Co., 385 F. 2d 922, 925, cert. den., 390 U.S. 1013.

20. See, for example, Pepperell Mfg. Co. v. N.L.R.B., 403 F.2d 520; N.L.R.B. v. Louisville Chair Co., 385 F.2d 922, cert. den. 390 U.S. 1013; Anchor Manufacturing Company v. N.L.R.B., 300 F.2d 301.

21. See, for example, New York Times Company v. Sullivan, 376 U.S. 254, 266-274; Rosenbloom v. Metromedia, 6/7/71, —— U.S. ——.

22. We are dealing here only with alleged misrepresentations. The problem of alleged coercion by one who has economic dominance over the employees is entirely different. (See, for example, N.L.R.B. v. Exchange Parts Co., 375 U.S. 405, 409; Medo Photo Supply Corp. v. N.L.R.B., 321 U.S. 678, 686; Roma Iron Works, Inc., 32 SLRB 521, 522, 536, and cases there cited.)

unlawful impact on the election so as to constitute improper interference with the free choice of a bargaining representative.[23]

3. *The Union's Conduct During the Election*

Respondent contends that the conduct at the polls of Union President Ottley interfered with the employees' free choice in selecting a representative. Affixed to its answer herein Respondent produced the affidavit[24] of one of its observers at the election, Sherrill Retrey, to the effect that Ottley and other union officials were seen within 50 feet of the polls while the election was in progress. Retrey's testimony at the hearing differed from her earlier affidavit. She testified orally that she saw only Ottley within the proscribed area. Significantly, according to her testimony as well as that of Board agent Richard Leary, Ottley did not talk to a single voter.[25] Leary also testified that he saw only Ottley and no other Union officials within the 50 foot area, and that he saw Ottley only once.

It is "electioneering" within the restricted area which is forbidden. There is no evidence that Ottley solicited votes for the Union, which constitutes the essence of elec-

23. Millard Fillmore Hospital, 28 SLRB 525, 527; Brooklyn Eye & Ear Hospital, 29 SLRB 398, 402; St. John's Queens Hospital, 31 SLRB 395, 402; N.L.R.B. v. Louisville Chair Co., 385 F.2d 922, 925, cert. den. 390 U.S. 1013.

24. This affidavit was merely a part of the pleadings, and does not itself constitute evidence upon the merits of the issues to be resolved by the Board.

25. The Society of the New York Hospital, 34 SLRB No. 3 and cases cited in footnote 16 therein.

tioneering.[26] The mere presence of a Union official does not violate the instructions in the Board's Notice of Election.[27] In fact, Union officials, by agreement of the parties, sometimes serve as observers at elections. Indeed, we pointed out many years ago: "* * * as a matter of courtesy, and to provide an added opportunity to observe the method, fairness and secrecy of the election, such persons in authority [in either management or the union] are permitted to visit the polling place for brief periods."[28]

We find that nothing in Ottley's brief appearance near the polling place improperly interfered with the employees' freedom of choice in the election.

4. *Tally of Ballots*

Forty-seven maintenance employees voted in the self-determination election. Of these, 21 ballots were cast in favor of a separate unit, 5 against a separate unit, 20 ballots were blank, and 1 was challenged. Respondent insists in its brief (pp. 81-88) that the Board erred in the computation of a majority by disregarding the blank ballots. It maintains that the blank ballots should have been included among the total number of ballots, because those who cast them "participated" in the election; and that if blank bal-

26. The Society of the New York Hospital, 34 SLRB No. 3; Troy Spring Works, Inc., 22 SLRB 69, 73; See also Wyckoff Heights Hospital, 28 SLRB 321, 327.

27. Star Industrial Service Co., Inc., 32 SLRB 546, 457; Saint Peter's Hospital, etc., 28 SLRB 516, 519; Versailles Restaurant, 4 SLRB 90, 94.

28. Board's Report (1937-1939), p. 33.

lots were counted, the 21 ballots cast in favor of a separate unit did not constitute a majority of the 47 total ballots cast.

Since its inception, the Board has not counted blank or void ballots in computing the total number of votes cast, and has certified the union which wins a majority of the valid ballots cast. As we stated in 1939 in Hotel St. George Corporation, 2 SLRB 590, 595:

> "Those who do not participate in an election are presumed to assent to the expressed will of the majority of those voting. Persons who cast blank or defective ballots are no more participants in an election than are persons who do not appear at the polls at all.[29] * * * It follows that in determining the question of a majority, only ballots validly cast are to be considered, and that blank and void votes cannot be included in the totals comprising those voting or participating."

The Board has consistently followed this same practice.[30]

C. Delay in Filing the Unfair Labor Practice Charges

Respondent contends that it has been prejudiced by the Union's delay, after issuance of the Board's Certification of Representatives, in seeking to enforce collective bargaining by not immediately filing the unfair labor charge in this proceeding. The Union instead had invoked the

29. Association of Clerical Employees v. Brotherhood of Railway & Steamship Clerks, 85 F.2d 152; Sorg Paper Company, 9 NLRB 136; International Nickel Company, Inc., 17 NLRB 35; Interlake Company, 4 NLRB 55, 61.

30. Metropolitan New York Nursing Home Association, Inc., 29 SLRB 69, 71. See also Vulcan Furniture Mfg. Corp., 97 NLRB 1116; N.L.R.B. v. Whittier Mills Company, 111 F.2d 474.

mediation and arbitration procedures of Section 716 of the Act.

Respondent instituted certain court proceedings which culminated in a 4-3 Court of Appeals decision, reversing all lower court decisions to the contrary, sustaining Respondent's contention that, if it wished to do so, it had a right to obtain judicial review of the Board's certification following an unfair labor practice proceeding.[31] The instant proceeding will afford it that opportunity under the procedure provided by the Act.[32] During the several years consumed by all this litigation, Respondent alleges, there has been a turnover of personnel in the appropriate unit.

In Roosevelt Hospital v. N. Y. S. L. R. B.,[33] the Court of Appeals affirmed the Board's extension of the life of its certification, under Section 19 of the Board's General Rules and Regulations, because of time consumed in litigating the construction of Section 716 of the Act. That case is determinative of the present issue, and for the same reasons we are extending the life of the certification herein. Any other disposition would encourage this and other employers to engage in procrastination in the hopes that, if enough time elapses, the normal one-year life of the Board's certification will have expired.

D. The Motions to Reopen the Hearing

On November 12, 1970, Respondent moved to reopen the hearing on the grounds (1) that there was newly discovered

31. The Long Island College Hospital v. Catherwood, 23 N Y 2d 20; reversing 26 AD 2d 543 and 155 N.Y.L.J. No. 84, p. 18.

32. Act, Sections 707 (4) and 716 (6).

33. 27 N Y 2d 25.

evidence and (2) that conflicting rulings of two of the Board's Trial Examiners in different cases deprived Respondent of due process and equal protection of the laws.

The alleged newly discovered evidence consists of the testimony of Board agent Richard Leary in another Board proceeding,[34] that he "always" prepares a memorandum for the Board when there are election objections. At the hearing herein, the Trial Examiner had ruled that Leary did not have to answer a question as to whether or not he had prepared such a memorandum here.

On December 3, 1970, the Board denied the motion to reopen the hearing, but granted the motion to the extent that it ordered that a memorandum prepared by Leary the day after the election be received in evidence and marked Board's Exhibit 18.[35] The Board overruled the Trial Examiner in not permitting the witness to answer the question as to whether he had made such a memorandum but found that no useful purpose would be served by reopening the hearing.[36]

On December 15, 1970, Respondent moved the Board to reconsider the denial of the motion to reopen, and that it be allowed to cross-examine Leary. Answering affidavits

34. The Society of The New York Hospital, 34 SLRB No. 3.

35. The affidavit by Leary, verified November 25, 1970, relating to his earlier memorandum, was not an "answering" affidavit upon the motion to reopen the hearing, but was prepared at the request of the Board after it had determined to reverse the Trial Examiner's ruling. Leary was a disinterested witness and not a party. Therefore, its timeliness under Rule 39 is irrelevant. Moreover, the Board may waive rules as to timeliness. See Lake Placid Club v. Abrams, 6 A D 2d 469, aff'd 6 N Y 2d 817.

36. Dec. No. 12933.

were filed by the Union and by the Board's Associate General Counsel.

Section 58 of the Board's General Rules and Regulations provides that hearings may be reopened on motion because of newly discovered evidence. An application for reopening a hearing is addressed to the discretion of the Board.[37] For the purpose of the motion to reopen, the Board assumed that all the non-conclusionary and non-argumentative statements made in the papers accompanying the motion were true and accurate. The evidence so offered was unnecessary and irrelevant, since Leary's testimony was not germane to any of the determinative issues of the case, and his credibility was not involved.[38] As stated above, nothing to which either Leary or any witness for Respondent testified was material on the question of electioneering, the matter upon which Respondent sought to examine him.

Respondent relies upon Jencks v. U.S.A.[39] There it was held that it was not for the judge alone to decide whether the document sought to be produced is material without exhibiting it to the opposing party,[40] but for the defendant's counsel to determine whether or not he wished to cross-

37. The Society of The New York Hospital, 34 SLRB No. 3; Scialli Holding Corporation, 32 SLRB 93; U.S. v. Pierce Auto Freight Lines, 327 U.S. 515, 535; RCA v. U.S., 341 U.S. 412, 420.

38. Respondent's assertion that it had a right to attack Leary's credibility by using his own memorandum is irrelevant, since none of the Board's findings herein rest upon crediting Leary's testimony and discrediting contrary testimony offered on behalf of Respondent.

39. 353 U.S. 657.

40. The document must be material before it need be produced. Communist Party of the U.S. v. Subversive Act Control Bd., 254 F. 2d 314, 328.

examine on it. Here, the Board has produced Leary's memorandum and furnished a copy of it to Respondent.

On its face, it is clearly immaterial to the issue of electioneering for which Respondent sought to examine it. Once produced, neither the Jencks case, nor the constitution,[41] can be tortured into requiring a reopening of the hearing for the trial of needless and collateral issues.[42] On its face nothing in Leary's memorandum would give Respondent a license to engage in fruitless and endless cross-examination.[43]

Accordingly, the Board hereby denies Respondent's motion for a reconsideration of its denial of the motion to reopen the hearing.

Upon its consideration of the entire record, the Board makes the following:

Findings of Fact

1. Respondent, The Long Island College Hospital, a domestic membership corporation, owns, operates, manages and controls a voluntary non-profitmaking hospital located at 340 Henry Street, and a Pavilion located at the corner of Washington Avenue and St. Johns Place, Borough of Brooklyn, City and State of New York.

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41. The courts have not determined whether the rule of the Jencks case is constitutional or statutory. (See N.L.R.B. v. Capitol Fish Co., 294 F. 2d 868, 869).

42. Palermo v. U.S., 360 U.S. 343, 355.

43. Leary's memorandum merely repeats the information contained in the Report on Count, which was served on the parties after the election, and was already in evidence. (Board's Exhibit 5) Thus, Respondent already had the opportunity to cross-examine Leary on those matters.

Appendix C

2. Local 144, Hotel and Allied Service Employees Union, SEIU, AFL-CIO, herein called the Union, is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employees concerning grievances, terms or conditions of employment, or of other mutual aid or protection.

3. All full time and regular part time employees in the maintenance of plant and engineering department (excluding chief engineers, assistant chief engineers, maintenance supervisor and clerk) employed by Respondent at 340 Henry Street and the Pavilion located at the corner of Washington Avenue and St. Johns Place, Borough of Brooklyn, City and State of New York, constitute a unit appropriate for the purposes of collective bargaining.

4. On December 28, 1964, the Board certified the Union as the exclusive bargaining representative of the employees in the appropriate unit described in Finding 3, above.

5. Local 144 continues to be the exclusive bargaining representative of the employees in the appropriate unit described in Finding 3, above, for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

6. At all times since January 14, 1965, Respondent has failed and refused, and continues to fail and refuse, to meet, confer, discuss and negotiate with the Union as the exclusive bargaining representative of the employees in the unit

found appropriate in Finding 3, above, in respect to rates of pay, wages, hours of employment and other conditions of employment, although requested to do so by the Union.

Conclusions of Law

Upon the basis of the foregoing Findings of Fact and upon the entire record in this proceeding, the Board finds and concludes as a matter of law:

1. Respondent, The Long Island College Hospital, a non-profitmaking hospital within the meaning of Section 701 (11) of the Act, is an employer within the meaning of Section 701 (2) of the Act.

2. Local 144, Hotel and Allied Service Employees Union, SEIU, AFL-CIO, is a labor organization within the meaning of Section 701 (5) of the Act.

3. All full time and regular part time employees in the maintenance of plant and engineering department (excluding chief engineers, assistant chief engineers, maintenance supervisor and clerk) employed by Respondent at 340 Henry Street and the Pavilion located at the corner of Washington Avenue and St. Johns Place, Borough of Brooklyn, City and State of New York, constitute a unit appropriate for the purposes of collective bargaining.

4. At all times since December 28, 1964, Local 144 has been, and continues to be, the exclusive bargaining representative of the employees in the appropriate unit described in Conclusion 3, above, within the meaning of Section 705 (1) of the Act.

Appendix C

5. At all times since on or about January 14, 1965, Respondent has failed and refused, and continues to fail and refuse, to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit described in Conclusion 3, above, and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 704 (6) of the Act.

ORDER

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, and pursuant to Section 706 (3) of the New York State Labor Relations Act, it is hereby

ORDERED, that Respondent, The Long Island College Hospital, its officers, agents, successors and assigns shall:

1. Cease and desist from refusing to bargain collectively with Local 144, Hotel and Allied Service Employees Union, SEIU, AFL-CIO, as the exclusive bargaining representative of all full time and regular part time employees in the maintenance of plant and engineering department (excluding chief engineers, assistant chief engineers, maintenance supervisor and clerk) employed by Respondent at 340 Henry Street and the Pavilion located at the corner of Washington Avenue and St. Johns Place, Borough of Brooklyn, City and State of New York, in respect to rates of pay, wages, hours of employment and other conditions of employment;

2. Take the following affirmative action which the Board finds is necessary to effectuate the policies of the Act: upon

request, bargain collectively in good faith with Local 144, Hotel and Allied Service Employees Union, SEIU, AFL-CIO, as the exclusive bargaining representative of all full time and regular part time employees in the maintenance of plant and engineering department (excluding chief engineers, assistant chief engineers, maintenance supervisor and clerk) employed by Respondent at 340 Henry Street and the Pavilion located at the corner of Washington Avenue and St. Johns Place, Borough of Brooklyn, City and State of New York, in respect to rates of pay, wages, hours of employment and other conditions of employment and, if an understanding is reached, embody it in a signed agreement with the Union; and it is further

ORDERED, that the Certification of Representative (Dec. No. 11210) issued by the Board in Case Nos. SE-37117 and SE-38062, dated December 28, 1964, is extended for the period of one year from the date of the issuance of this Decision and Order, or from the completion of any judicial review thereof which may follow.

Dated: New York, N.Y.
June 30, 1971

Jay Kramer, Chairman of the Board, abstained and did not participate in the consideration of this proceeding.

Appendix C

Intermediate Report of the Trial Examiner

NEW YORK STATE
LABOR RELATIONS BOARD

Case No. SU-43142

In the Matter of

THE LONG ISLAND COLLEGE HOSPITAL

and

LOCAL 144, HOTEL & ALLIED SERVICE EMPLOYEES UNION, SEIU, AFL-CIO

Statement

On the basis of a charge filed on May 7, 1969 by Local 144, Hotel & Allied Service Employees Union, SEIU, AFL-CIO, herein called Local 144, the New York State Labor Relations Board, herein called the Board, duly issued its complaint on May 16, 1969 against The Long Island College Hospital, herein called Respondent, alleging, in substance, that Respondent had engaged in, and is engaging in, unfair labor practices in violation of Section 704 (6) of the New York State Labor Relations Act, herein called the Act.

The complaint, charge and notice of hearing were duly served upon Respondent and Local 144.

On June 4, 1969 Respondent filed an answer, denying in substance, the material allegations of the complaint, except

that it admitted that it had refused to bargain collectively with Local 144 in order to seek court review of "the constitutionality and validity of the legislation under which the New York State Labor Relations Board purported to act and the propriety and validity of the Board's acts pursuant to such legislation." The answer also alleges certain affirmative defenses.[1] A motion by the Board's attorney, and joined in by counsel for Local 144, to strike certain portions of the answer was granted in part and denied in part. Denied was the motion to strike paragraph "6" of the amended answer, which alleged, in substance, an affirmative defense that the Board's certification of Local 144 was invalid for various reasons set forth therein. This defense will be discussed at length below.

A hearing was held on eight days between June 11 and August 15, 1969, before Trial Examiner Oscar Forster, Esquire, duly designated by the Board.

At the close of the Board's case, Respondent moved to dismiss the complaint, alleging a failure of proof. I reserved decision on said motion. For reasons appearing later in this report, I recommend that the Board deny said motion.

Briefs filed by the Board's attorney and counsel for Respondent and for the Union have been carefully reviewed and considered.

Upon the basis of the entire record, the briefs and from my observation of the witnesses, I recommend that the Board make the following:

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1. At the commencement of the hearing, Respondent was permitted to amend its answer to allege additional material in paragraph "4" of Respondent's answer and to add to paragraph "11" of Respondent's answer an additional statement.

Appendix C

FINDINGS OF FACT

I. Respondent

The Long Island College Hospital is a voluntary, non-profit hospital with its main building located at 340 Henry Street, Borough of Brooklyn, City and State of New York.

II. The Union

It was stipulated, and the undersigned finds, that Local 144 is a labor organization, which exists and is constituted for the purposes, in whole or in part, of collective bargaining, or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection.

III. Jurisdiction of the Board

In the prior representation proceeding (27 SLRB 405), the Board found that it had jurisdiction over Respondent. Nothing in the present record warrants a different determination herein. Accordingly, I find and conclude that the Board has jurisdiction of this proceeding.

IV. Prior Proceedings

On July 6, 1964, the Board issued its Decision, Order and Direction of Election in Case Nos. SE-37117 and SE-38062.[2] However, prior thereto and after the original hearing in Case No. SE-37117 had been closed, Maintenance Division of the Building and Construction Trades Council, herein called Maintenance Division, filed its petition herein in Case

2. 27 SLRB 405.

No. SE-38062 on March 26, 1964. On April 3, 1964, Respondent moved to dismiss the petition of Maintenance Division. On April 16, 1964, the Board denied the motion to dismiss the petition filed by Maintenance Division and ordered that the hearing in Case No. SE-37117 be re-opened and that it be consolidated for the purposes of hearing with Case No. SE-38062. A consolidated hearing was held on April 29, 1964.

On July 22, 1964, the Board conducted an election among Respondent's service employees as to whether or not they desired to be represented by Local 144, and also a self-determination election among the maintenance of plant and engineering department employees to determine (1) whether they wanted a separate bargaining unit limited to the maintenance of plant and engineering department employees, (2) if they voted for a separate bargaining unit, whether or not they desired to be represented by Maintenance Division or by Local 144 or by neither, and (3) if they did not vote for a separate bargaining unit, whether or not they desired to be represented by Local 144 in the resulting single unit comprised of them and the service employees.

The reports upon Secret Ballot shows that 21 ballots, a majority of the valid ballots cast on the first question, were in favor of a separate bargaining unit limited to the maintenance of plant and engineering department employees, 5 ballots were case against such a separate bargaining unit, 20 ballots were blank, and one ballot was challenged. On the second question, 24 ballots, a majority of the valid ballots cast, were in favor of representation by Local 144,

4 ballots were cast in favor of representation by Maintenance Division, 16 ballots were cast for neither union, 2 ballots were blank, and one ballot was challenged.[3]

On July 29, 1964, Respondent filed objections to the election conducted by the Board among the maintenance of plant and engineering department employees.

On December 28, 1964, the Board overruled the said objections of Respondent as being insufficient and without merit, and certified Local 144 as the bargaining representative of the Respondent's maintenance of plant and engineering department employees.[4]

After the Board certified Local 144, counsel for Respondent, in a letter to Local 144, dated January 14, 1965, stated, among other things, "* * * at this time, the Hospital must go on record as refusing to bargain with your Union unless and until the constitutionality of the legislation in question and the validity of the Board's acts pursuant to it had been finally determined by the courts."

Thereafter, on January 26, 1965, Local 144 notified the New York State Mediation Board, herein called the Mediation Board, of Respondent's refusal to bargain with it as the collective bargaining representative of the employees

3. Local 144 lost the election among the service employees. Objections to that election filed by Local 144 were dismissed by the Board. This proceeding solely concerns itself with the certification of Local 144 as the bargaining representative of the maintenance of plant and engineering department employees.

4. Subsequent to the filing of the charge herein, Respondent, on May 13, 1969, moved before the Board to vacate the Board's certification of Local 144, on the ground, in substance, that due to the passage of time and the change in the composition of the unit, it was now stale and unenforcible. On May 16, 1969, the Board denied the Respondent's motion to vacate the certification.

in the maintenance of plant and engineering department, and requested the Mediation Board to invoke "all appropriate procedures under Section 716 of the New York State Labor Relations Act for the purpose of effecting a settlement of this dispute."[5]

On January 29, 1965, the Mediation Board advised the parties that an informal mediation conference had been

5. Section 716 (3) and (4) provided at that time:

"3. Every collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center which does not contain provision for the final binding determination of disputes shall be deemed to include provisions for:

(a) the appointment of a fact-finding commission by the New York State Board of Mediation upon the request of both parties to the dispute, or by the Industrial Commissioner upon his own motion and upon certification by such board that in its opinion efforts to effect a voluntary settlement of the dispute have been unsuccessful. Such fact-finding commission shall have all of the powers and duties, including the power to make recommendation for the settlement of the dispute, as are vested in the board of inquiry by article twenty-two of this chapter; and

(b) the submission of the dispute to arbitration, pursuant to such rules as may be established from time to time by the New York State Board of Mediation, by such Board of Mediation upon the request of both parties to the dispute, or by the Industrial Commissioner upon his own motion and upon certification by such Board of Mediation that in its opinion efforts to effect a voluntary settlement of the dispute have been unsuccessful.

4. In the absence of a collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center, the New York State Board of Mediation and the Industrial Commissioner may, in the manner and upon the conditions provided in subdivision three of this section, exercise all of the powers vested in them by the provisions of such subdivision of such section."

These subdivisions were amended by the Laws of 1969, ch. 526, effective July 1, 1969, but the changes made are not material herein.

arranged for February 4, 1965. On February 3, 1965, in reply to the letter of the Mediation Board, the attorneys for Respondent suggested to the Mediation Board, for reasons set forth in their letter, that the Mediation Board "should desist from taking any action in this matter, leaving it to the jurisdiction of the New York State Labor Relations Board. The attorneys for Respondent closed their letter by indicating their willingness to attend the conference "on the understanding that we will not thereby waive our rights to question your jurisdiction."

The parties appeared twice at the Mediation Board but according to a statement in a letter of the attorneys for Respondent to the Industrial Commissioner, dated May 4, 1965, the appearance of Respondent was "limited to stating orally to the Mediation Board * * * that the State Labor Relations Board had exclusive jurisdiction in the matter."[6]

On April 29, 1965, the Chairman of the Mediation Board advised the parties that since mediation of the dispute between the parties had failed, the Mediation Board was so certifying to the Industrial Commissioner pursuant to Section 716 of the Act.

On June 30, 1965, the office of the Industrial Commissioner advised the attorneys for Respondent that the Industrial Commissioner had appointed a fact-finding commission to inquire into the labor dispute between the parties. On July 6, 1965, the fact-finding commission appointed by the Industrial Commissioner invited the parties to appear be-

6. It is deserving of comment at this point to note that Respondent, both before this letter and since, and in this very proceeding, contested the "constitutionality and validity of the legislation under which the New York State Labor Relations Board purported to act."

fore the Commission and make an oral presentation of their positions. The Commission also invited the parties to submit a written statement of their respective positions. On July 9, 1965, attorneys for Respondent, in reply to the Commission's invitation to appear before it, repeated their claim that the Mediation Board lacked jurisdiction and that they were "not authorized to discuss any terms or conditions of employment of employees of The Long Island College Hospital, or any other matter that might be termed a dispute as Section 716 of the SLRA, as amended, defines the term." In the same letter, the attorneys for Respondent, nevertheless offered to meet with the Commission "for the sole purpose of discussing the procedures to follow in order to dispose of the basic issue, namely, the Hospital's refusing to recognize the Union or to bargain with it."

On July 26, 1965, the fact-finding commission issued an Interim Report wherein it rejected Respondent's argument that the Commission lacked jurisdiction over the controversy between the parties and decided to proceed with the case.[7]

On August 5, 1965, following the issuance of the Interim Report, the attorneys for the parties appeared before the Commission. Respondent asked for time within which to commence an action to seek injunctive relief and a declaratory judgment as to the question of the Commission's juris-

7. As a basis for proceeding with this matter, the Commission stated in its Interim Report that "the election petition in this case was filed over two years ago. The certification issued more than a half a year ago. For the union to have gone back to the SLRB for an order to bargain and then to have proceeded through judicial review would have taken months, perhaps years more. A contrary result [the Commission's decision to proceed with the case] would, moreover, mean that a union must come in with a judicial order to bargain to avail itself of Section 716, and we do not believe the Legislature intended so to limit the remedy."

diction. The Commission granted Respondent's request and voluntarily stayed further action on its part, on condition that Respondent commence an action of this character without delay.

On August 17, 1965, Respondent commenced an action in the Supreme Court, County of New York, against the Industrial Commissioner, the members of the fact-finding commission, the members of the Board, and the officers of Local 144 for a declaratory judgment holding that the fact-finding commission had no jurisdiction to proceed pursuant to Section 716 of the Act, and for a permanent injunction. Respondent also moved for a preliminary injunction.

On April 29, 1966, Mr. Justice Marks denied Respondent's motion for a temporary injunction. On May 13, 1966, Respondent appealed to the Appellate Division, First Department, from Mr. Justice Marks' decision denying Respondent's motion for a temporary injunction. On the same day, Respondent moved the Supreme Court, New York County, for summary judgment. The Attorney General on behalf of the official party-defendants, and counsel for Local 144, cross-moved for summary judgment.

On June 30, 1966, the Appellate Division affirmed Mr. Justice Marks' decision denying Respondent a temporary injunction.[8]

On January 18, 1967, the Supreme Court, County of New York, by Mr. Justice Flynn, denied Respondent's motion for summary judgment and granted the defendant's cross-motions for summary judgment.[9]

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8. 26 App. Div. 2d 543.

9. 157 N.Y.L.J. No. 12 (1/18/67) p. 15; 64 LRRM 2303; 54 Labor Cases par. 51, 621.

Appendix C

Between April 29, 1966 and May 22, 1967, when the fact-finding commission issued its Final Report, the commission held 12 days of hearings, with approximately 500 pages of sworn testimony taken and numerous exhibits received in evidence.

On July 6, 1967, the Industrial Commissioner ordered compulsory arbitration of the dispute between the parties in accordance with Section 716 of the Act, and designated the New York State Board of Mediation as arbitrator.

On July 21, 1967, Respondent commenced a special proceeding pursuant to Articles 75 and 78 of the CPLR to stay the compulsory arbitration ordered by the Industrial Commissioner. Again, the defendants in that proceeding were the Industrial Commissioner, the members of the fact-finding commission, the members of the Board and the officers of Local 144.

On September 5, 1967, the Supreme Court, County of New York, by Mr. Justice Davidson, denied Respondent's application to stay compulsory arbitration.[10] On October 5, 1967, the Appellate Division, First Department, affirmed the order of Mr. Justice Flynn, denying Respondent's motion for summary judgment and granting of the defendants' cross-motions for summary judgment.[11]

On January 30, 1968, the Appellate Division, First Department, affirmed the order of Mr. Justice Davidson, denying Respondent's motion to stay the compulsory arbitration ordered by the Industrial Commissioner.[12]

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10. 54 Misc. 2d 712; 66 LRRM 2360; 56 Labor Cases par. 51, 743.

11. 28 App. Div. 2d 1092.

12. 29 App. Div. 2d 642.

Appendix C

On October 16, 1968, the Court of Appeals, by a vote of four to three, reversed both determinations by the Appellate Division, First Department, and held that the fact-finding and the arbitration procedures provided in Section 716 of the Act may not be invoked initially where the employer challenges the Board's certification of the union's representative status and seeks a judicial review thereof.

On November 20, 1968, the Court of Appeals denied the motions of the Attorney General and Local 144 for reargument or to amend the remittitur of the Court of Appeals.[13]

On February 7, 1969, the Supreme Court, County of New York, by Mr. Justice Gold, granted Respondent's motion for an order permanently staying the arbitration ordered by the Industrial Commissioner, in accordance with the order of remittitur of the Court of Appeals.

V. The Refusal to Bargain

The complaint alleges, in substance, that since December 28, 1964, Respondent has failed and refused, and continues to fail and refuse to bargain collectively with Local 144 as collective bargaining representative of Respondent's employees within the appropriate unit. Respondent conceded that it had refused to bargain, but contends, in effect, that its refusal to bargain was not unlawful. In its answer to the complaint, at the hearing, and in its brief submitted

13. Local 144 appealed the decision of the Court of Appeals to the United States Supreme Court, which, on April 21, 1969, dismissed the appeal. 394 U.S. 716; 22 L Ed 2d 672, 89 S Ct 1457, 60 Labor Cases par. 52, 063.

to me, Respondent challenges the validity of the Board's certification.

In the main, the testimony and the exhibits at the hearing were limited to the issue of the validity of the certification. The entire record, including the exhibits, in the representation cases (Cases Nos. SE-37117 and SE-38062) were received in evidence.

In Respondent's brief, which states with more specificity, the substance of the allegations in paragraph "6" of the answer, which serves as the basis of Respondent's attack on the Board's certification, five reasons have been set forth to support its contention that the certification was invalid. They will be considered and discussed *seriatim*. As set forth in the brief, they are as follows:

> *"1. The Labor Board certified the Union as the exclusive representative of a bargaining unit that is inappropriate in contravention of the provisions of the State Labor Relations Act."*

The appropriateness of the unit was litigated by the parties and decided by the Baord in the underlying representation case. It is well settled that in the absence of newly-discovered or previously unavailable evidence, issues which were decided or could have been raised in the related representation case may not be re-litigated in an unfair labor practice proceeding based upon the Board's decision in the representation matter.[14] Since Respondent does not contend that there is newly-discovered evidence or evidence unavailable at the time of the hearing in the

14. Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 161-162.

representation proceeding, it follows that the decision of the Board is binding upon me and dispositive of the question of the appropriateness of the certified unit.

> *"2. The Board denied the Hospital's procedural due process by arbitrarily and capriciously processing BCTC's [Maintenance Division] petition in contravention of its own Rule 41 and its practice thereunder, to the prejudice of the Hospital and its maintenance employees."*

This contention was raised by Respondent in its motion, dated April 31, 1964, to dismiss the petition of Maintenance Division in Case No. SE-38062, and reasserted at the reopened and consolidated hearing in the representation cases, and was rejected by the Board. As in the case of the attack on the Board's appropriate unit finding, it may not be re-litigated in a related refusal to bargain proceeding. Accordingly, I find that this contention is without merit.

> *"3. The form of the ballot on which the Labor Board required the maintenance employees to vote was in English only, denied to said employees the opportunity of expressing their wishes with respect to representation and unit placement by making a single mark on their ballot, and was so complex, complicated and confusing as to deprive the employees of a proper opportunity to express their wishes with respect to unit placement and union representation."*

First, concerning the request for a bilingual (English and Spanish) ballot for the maintenance department employees, Respondent points to the fact that 16 of the 55

maintenance employees eligible to vote in the election were Spanish-speaking.

Nowhere in the record is there any evidence to be found that any of the alleged 16 Spanish-speaking employees lacked sufficient command of the English language to enable them to understand the ballot and the purposes of the election. Obviously, the essential fact to be considered is not that some of the employees involved spoke Spanish, but whether their knowledge of English was sufficient to enable them to comprehend the nature of their vote in a representation election and to intelligently exercise their right to vote.

The cases cited by Respondent in its brief on this point are not applicable because they referred to employees who were shown by the evidence not to understand English. This is not the case here.

Moreover, it should be noted that, in any event, the notice of election issued by the Board, which was in a combined for for both the service unit and the Maintenance Department unit, was in both English and Spanish. Louis Gallousis, Personnel Director of the hospital, testified that the bilingual notices of election were distributed to the employees involved and were posted, prior to the date of election, in the time clock area at the employees' entrance to the hospital.

Respondent, in its brief, makes it appear that Richard J. Leary, the Board's Labor Election Supervisor, arbitrarily decided to have the ballot in the self-determination election in English only. This is not borne out by the record. Although a request had been made for a bilingual

ballot, the evidence shows that the parties were finally in agreement that the ballot should be in English only. Testifying as Respondent's witness, Donald D. Rowe, who had been retained by Respondent prior to the Board's elections, to advise the Respondent on communications to its employees, including matters relating to the elections, stated that he was present at a pre-election conference of the parties conducted by the Board's staff, during which the question of a bilingual ballot was raised. It is clear from Rowe's testimony that the decision to use a ballot in English only for the maintenance employees was made by agreement of the parties and not at the sole discretion of Leary, as Respondent states in its brief. Rowe's testimony, on direct examination, in this connection is as follows:

> "Q. Was there any discussion about making the multiple question ballot bilingual?
>
> A. Yes. That question was raised. I don't recall by whom. I do know that there was general agreement after considerable discussion that this would further complicate it and consequently the ultimate result of the conference was that the second ballot would not be bilingual, would not be in both American and Spanish, but only English language form."

The National Labor Relations Board, in a case involving a similar situation, rejected an attack on its certification based on the failure to use foreign language ballots. It found that while the ballot was in English, the notices were in English, Polish and Spanish, and that the foreign-speaking employees were thus assured an opportunity to make

an effective and informed expression of their true desires.[15] I find and conclude that there is no merit to Respondent's contention that the failure to use a bilingual ballot for the maintenance employees invalidates the certification.

Respondent also attacks the form of the ballot used in the self-determination election among maintenance department employees as being "* * * complex, complicated and confusing." The record is barren of any evidence showing that any of the employees involved were confused by the form of the ballot and failed to understand particularly Question "1" of the ballot.[16]

Respondent, as support for its contention on this point, cites the fact that 20 of the 46 unchallenged voters cast blank votes on Question "1"; ergo, 'the confusion of the voters was staggering."

Apart from the fact that the record is absolutely devoid of any evidence that any of the employees were confused by the form of the ballot, it is axiomatic that if an employee does not vote, he can be presumed to have acquiesced in the expressed will of a majority of those who voted.[17] It follows that, absent cogent proof that any of the employees who cast blank ballots did not understand Question

15. Thomas A. Nelson d/b/a Trio Metal Cap Co., 168 NLRB No. 105, 66 LRRM 1382. Cf. Fibre Leather Mfg. Corp., 167 NLRB No. 57, 66 LRRM 1056, in which the National Board set aside an election where only English ballots had been available, and where *it was shown* that approximately one-quarter of the eligible voters could not *understand* English.

16. Question "1" was whether or not the employees involved desired a separate bargaining unit limited to maintenance of plant and engineering department employees.

17. Hotel St. George Corp., 2 SLRB 578, 595; see also Railway Clerks v. Non-Contract Employees, 380 U.S. 650, 670.

"1" on the ballot, it is more reasonable to assume that the 20 employees who cast such ballots on Question "1" were not interested in the matter of a separate unit, than to assume that they were confused by the form of the ballot, as claimed by Respondent.

Since 1964, when the Board first afforded hospital employees in appropriate cases self-determination elections, the Board has employed a ballot, similar in form to that used in the election in question, in approximately thirty ordered self-determination hospital elections. A search of the Board's records fails to reveal a single instance, save in this case, where an attack has been made on the form of the ballot used in self-determination elections.

Finally, it is well established that the Board's choice as to the form of the ballot is not open to judicial review, absent a showing that the Board had acted in excess of its statutory authority. The United States Supreme Court held in Railway Clerks v. Non-Contract Employees,[18] that the Railway Labor Act empowered the National Mediation Board to establish rules governing elections and left the details of selecting bargaining representatives, *including the form of the ballot,* for the final determination of the National Mediation Board.[19] Also, in International Telephone and Telegraph Corp. v. N.L.R.B., the United States Court of Appeals observed that:

> "An allowance of discretion comports with the familiar rules of administrative law which leaves matters within the peculiar expertise or experience of the administrative bodies to the administrator."[20]

18. 380 U.S. 650.

19. In respect to elections, the provisions of Railway Labor Act and the State Act are almost identical.

20. 294 F.2d 393.

Accordingly, I find that there is no merit to the Respondent's contention concerning the form of the ballot in the self-determination election conducted among the maintenance department employees.

> *"4. The Labor Board tallied the ballots of the maintenance employees in a manner contrary to its own Decision, Order and Direction of Election and contrary to the requirements of the State Labor Relations Act. It should have tallied their ballots along with the ballots of the service employees, inasmuch as a majority of the 47 maintenance employees voting in the election did not vote in favor of a separate unit of Maintenance of Plant and Engineering Department employees."*

In the brief, Respondent quotes at length from the Board's Decision, Order and Direction of Election, concerning the matter in which the self-determination election shall be conducted and how the ballots shall be counted. Respondent particularly emphasizes that the Board used the words "a majority of the maintenance of plant and engineering department employees voting in the election, etc." Respondent argues that if only 21 of the 46 maintenance employees voting in the election voted affirmatively on Question "1" (as to whether they wanted a separate bargaining unit), it means that less than a majority voting in the election voted for a separate bargaining unit, and the Board should have mingled their ballots with the ballots of the service employees, and made a combined tally of the votes in a single unit of service and maintenance employees. Respondent maintains that if this procedure had

been followed, it would have resulted in a dismissal of Local 144's petition in its entirety.

However, a reading of the Board's Decision reveals that the quotation set forth in Respondent's brief was taken out of context, as no mention is made by Respondent concerning an additional provision in the Board's Decision which specifically provides the manner in which the votes on Question "1" were to be tallied.

In the section of the Board's Decision entitled "VI. The Elections" which follows immediately after the description of the form of the ballot to be used, there is set forth the following:

> "If a majority of the *answers* to Question "1" are affirmative, we shall find a separate maintenance of plant and engineering department unit to be appropriate. * * *" (emphasis supplied)

As has been previously noted, the vote on Question "1" was 21 votes for a separate bargaining unit, 5 against, with 20 blank ballots and one challenged ballot. Thus, the valid ballots cast on Question "1" were over four to one for a separate bargaining unit.

It was a matter of no small concern to the Board to assure that the employees involved in this election understood that they had the right to vote on the question of a separate unit, whether they chose to exercise it or not. To this end they were informed in simple and clear language as to the rules promulgated by the Board for the counting of the ballots cast on each question. The notice of election which was distributed to the employees and posted on the hospital's premises stated, at the foot of page 1 thereof, the following:

Appendix C

"COUNTING OF BALLOTS

"On each question, the decision of a majority of those casting valid ballots will be determinative."[21]

Accordingly, I find and conclude that the Board's tally of the ballots cast in the self-determination election is correct and is entirely consistent with the provisions of the Board's Decision, as well as the notices of election which were distributed to the employees involved and posted on the hospital's premises.

> *"5. The Labor Board acted arbitrarily, unreasonably, discriminatorily and contrary to law by refusing to set aside the election it conducted for the maintenance employees notwithstanding Local 144's conduct before and on the day of the election that had interfered with the maintenance employees' free choice of a bargain-representative."*

This would appear to be the main thrust of Respondent's contention that the Board erred in certifying Local 144 as the collective bargaining representative of the maintenance department employees.

At the close of the first day's session of the hearing, counsel for Respondent requested a ruling as to whether he

21. In the Spanish notice of election the following appears at the foot of page 1 of the notice:

"EL CONTAGE DE LOS VOTOS

"En cada pregunta, la decision de la mayoria de aquellos votando en papeletas validas sera lo determinante."

(underscoring in the original)

The Examiner's knowledge of Spanish is sufficiently adequate to recognize that this is an accurate translation of the same legend concerning the counting of the ballots that appeared in the English version of the notice of election.

would be permitted to adduce testimony from certain witnesses for whom the Board had issued subpoenas, as requested by Respondent, concerning the events set forth in Respondent's objections to the election. Over the objction of the Board's attorney and counsel for Local 144, I announced that I would permit Respondent to offer evidence in support of its objections to the election and I thereupon adjourned the hearing for one week to afford Respondent's counsel "an opportunity to marshal his evidence."

In its brief, Respondent describes certain activities of Local 144 which Respondent alleges interfered with the free choice of the maintenance employees in selecting a collective bargaining representative. They will be considered now.

The Conduct of Mr. Ottley

It is alleged that while the polling was in progress, Peter Ottley, President of Local 144, appeared within the voting area (50 feet from the entrance to the polling place).

Richard J. Leary, the Board's Labor Election Supervisor, called as a witness by Respondent, testified that prior to the opening of the polls he instructed the parties' representatives that they were required to remain a distance of 50 feet from the entrance to the Nurses' Residence, the building in which the election was to be conducted, and that if they desired to consult him during the time when the polls were opened, they were to send him a message.

Leary testified that during the election, Ottley sent such a message to him. Leary left the polling place and as he was going down the steps of the Nurses' Residence he

saw Ottley start in from the 50-foot point. Leary met Ottley and walked him back to the 50-foot point, where he had a conversation with him. Leary further testified, without contradiction, that during the entire time that Ottley was within the proscribed area, Ottley did not speak to anyone other than to Leary.

Sherill Retrey, also known as Sherill Rosenbaum,[22] who was employed by the Hospital at the time of the election as a receptionist and had acted as an Employer's observer at the election, testified that while she was present at the polling place during the morning hours of the election, she saw Ottley twice within the voting limits—once, when she saw his face through the door leading into the building, and then again when she saw his entire figure, with one leg up on the steps. According to Retrey, at the time she saw Ottley, voters were passing by her and "as soon as they left me, they went out."

Thus, from Retrey's testimony, it would appear that if Ottley did come in contact with any voters within the voting area, it was after they had voted, and he could not have affected their votes. In any event, it is unnecessary to speculate on whether Ottley did in fact converse with any voters approaching the polling place, because neither Retrey or Leary or any other witness testified that Ottley was seen speaking to any voter within the voting area while the election was in progress.

The Board's notice of election contains the following paragraph:

22. Retrey had executed an affidavit on December 21, 1964, which Respondent filed with the Board in support of its objections.

Appendix C

> "Voters shall be allowed to vote without interference or coercion. Electioneering will not be permitted at, or within 50 feet of any entrance to, the building in which the election is being held. The Board expects voluntary compliance with this regulation; otherwise it will be strictly enforced."

Respondent has offered no evidence, or even argued, that Ottley had spoken to any voter or otherwise electioneered within the voting area.

Absent a showing of electioneering on the part of Ottley within the voting area, his mere presence within the 50 foot limit cannot create an inference that he thus interfered with the free choice of the voters and that this constitutes grounds for setting aside the election and consequently invalidating the certification.[23]

In sum, there being no evidence that any electioneering occurred within the voting area, I find and conclude that there is no merit to Respondent's contention.

The Anonymous Letter

Respondent states that "On Sunday, July 19 [1964], some unknown person or persons mailed to the employees of The Long Island College Hospital, on Hospital stationery and under cover of official Hospital envelopes, a letter purporting to be from someone in management and urging the members to 'join the Union.' "

The letter referred to, which was received in evidence, was indeed enclosed in an envelope bearing the name and

23. Star Industrial Service Co., Inc., 32 SLRB 546; Versailles Restaurant, 4 SLRB 90, 94.

address of the Hospital, but the letter was not on Hospital stationery as stated by Respondent. The letter in question appears to be mimeographed and is on a plain sheet of paper with no reference whatsoever, by name, to the Hospital. Moreover, it clearly did not purport to be from "someone in management," as claimed by Respondent. The letter starts, "I work for the Hospital" and is signed "A Fellow Employee."

The U.S. Court of Appeals (5 Cir., 1969) recently observed in Bushhog, Inc. v. NLRB[24]:

> "We think it is clear that conduct not attributable to the opposing party cannot be relied upon to set aside an election. The only exception to this general principle, not applicable here, is where coercive and disruptive conduct or other action is so aggravated that a free expression of choice of representation is impossible. See N.L.R.B. v. Smith Industries, Inc., 5 Cir. 1968, 403 F.2d 889, 69 LRRM 2660; Home Town Foods v. N.L.R.B., supra; N.L.R.B. v. Tampa Crown Distributors, 5 Cir. 1959, 272 F.2d 470, 45 LRRM 2109. Any other rule would invite third parties or one of the protagonists who doubted the election outcome to anonymously create incidents and then attempt to use them to set aside the election."

Apart from the fact that the letter contains no threats of reprisals or any other coercive statements, which if it had, might, in certain circumstances, provide a basis for setting aside the election, there is no proof that this letter was sent by Local 144 or any responsible agent of that

24. 420 F.2d 1266, 73 LRRM 2066.

union. Clearly, this letter furnishes no basis for setting aside the election.[25]

Local 144's "Special Edition"

Commencing shortly before midnight on Monday, July 20, 1964, Local 144 began distributing to the Hospital's employees a printed "Special Edition" of its publication called "Bulletin." The election was held on July 22, 1964, between the hours of 6:30 A.M. and 5:30 P.M.

Respondent contends that the "Special Edition" contained misstatements of fact sufficiently material to constitute interference with the employees' free choice of a collective bargaining representative.

Respondent refers to alleged misstatements of fact concerning the wage and fringe benefits provided in contracts which Local 144 then had with Jamaica Hospital, Doctors Hospital, Leroy Osteopathic Hospital and Pelham General Hospital.

More specifically, Respondent cites statements in the "Special Edition" to the effect that the agreement with Jamaica Hospital provided that the employees covered by that agreement had received an increase of $82 per month based on an $8 weekly increase, but Respondent's computation, based on the provisions in the Jamaica Hospital contract, shows that although some of the employees would receive an increase of $82 a month based on an $8 a week increase, a majority of the employees, however, would be receiving only $6 a week more and their resulting increase would be $73.78 a month rather than $82.

25. The New York Infirmary, 27 SLRB 557, 566; Wyckoff Heights Hospital, 28 SLRB 334, 335.

Appendix C

The headline on the article in question states "$82 PER MONTH BOOST *DURING LIFE OF PACT* AT JAMAICA HOSPITAL." (emphasis added) The Jamaica Hospital contract was for a period commencing February 1, 1964 and expiring December 30, 1967, or 1 month short of 4 years. It provided for periodic wage increases through its term, and the claimed $82 a month wage increase apparently is based on the total increases during the life of the contract.

Also, Respondent contended that it was a misrepresentation for Local 144 to claim in the "Special Edition" that the employees at Leroy Osteopathic Hospital would receive, on December 1, 1965, a weekly increase of $5, whereas an analysis of the agreement with that hospital shows that only 5 employees would receive such an increase and the majority of employees would receive only $4 more a week.

Another alleged misrepresentation cited by Respondent is the statement in the "Special Edition" that the wage increases at Pelham General Hospital were from $12 to $25, and at Doctors Hospital they were from $16 to $25. Respondent labels these statements as "outright lies." According to Respondent, the most any employee at Pelham General Hospital received was $17, the majority receiving only $13 more, and that the increases at Doctors Hospital amount to $16.25 rather than $16 to $25 as claimed by Local 144.

Another instance of misleading information in the "Special Edition", according to Respondent, was the reference in the Jamaica Hospital article that the employees who had unused sick leave at the end of each calendar year

would receive full pay for such unused sick leave, whereas the contract in question provided pay for only 50% of the unused sick leave.

Still another instance cited by Respondent is the statement that Local 144 had filed with the Board unfair labor practice charges against St. Barnabas Hospital and against Wyckoff Heights Hospital, alleging Interference. At the hearing, counsel for Local 144 conceded that there were no unfair labor practice charges against either institution pending before the Board at the time of the publication of the "Special Edition." Counsel for Local 144 offered to stipulate that at the time the "Special Edition" was published there were pending election objections filed by Local 144 with the Board involving elections held at St. Barnabas and Wyckoff Heights Hospitals. Counsel for Respondent refused so to stipulate on the ground that he had no knowledge of the said election objections. The record does not reflect whether election objections of this character were pending before the Board at the time in question. However, in my opinion, this misstatement is of such minimal significance that it is fair to assume that not a single employee voting in the maintenance department election would have been influenced as to his vote by the fact that alleged unfair labor practice charges were filed against two other hospitals not involved in this election.

The Board has consistently held that ordinarily it does not undertake the censorship of pre-election campaigns and will not set aside the results of an election by secret ballot merely because alleged false or misleading statements have been made by one of the parties during the campaign. Not all misrepresentations constitute grounds for vacating

an election. The misrepresentation must be such as to constitute an interference with the free choice of a bargaining representative. In determining whether an alleged misrepresentation exceeds the bounds of legitimate propaganda, it is necessary to consider a number of facts, including the materiality of the representation, whether the party making the representation had special or exclusive knowledge of the facts, whether the challenging party had an opportunity to, or did, rebut the false representation, and whether the misrepresentation reasonably may be expected to have significant impact on the election.[26]

The burden of proof is on the party filing objections to the election, and the presumption that an election reflects the true choice of the voters is not overcome by assertions but only by probative evidence.[27] Respondent produced no evidence sufficient to sustain its allegation that the statements contained in the "Special Edition" exerted coercion of such character that there was interference with the free choice of the employees or that it probably affected the outcome of the election.[28]

Moreover, there is no showing that Respondent lacked an adequate opportunity to reply, giving its view of the facts.[29]

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26. Millard Fillmore Hospital, 28 SLRB 525, 527; Brooklyn Eye and Ear Hospital, 29 SLRB 398, 402; St. John's Queens Hospital, 31 SLRB 395, 402.

27. The New York Infirmary, 27 SLRB 557, 563; St. John's Queens Hospital, 31 SLRB 395, 402.

28. St. Peter's Hospital, 28 SLRB 516, 520; Wyckoff Heights Hospital, 28 SLRB 321, 325; Roosevelt Hospital, 30 SLRB 209, 216-217; St. John's Queens Hospital, 31 SLRB 395, 402.

29. Buffalo General Hospital, 29 SLRB 33, 34; Brooklyn Eye and Ear Hospital, 29 SLRB 398, 402; St. John's Queens Hospital, 31 SLRB 395, 402.

Appendix C

Respondent became aware of the leaflet in question shortly before midnight, July 20, 1964. Rowe, who had been engaged by the Hospital to handle their communications to the employees concerning, among other things, the forthcoming election, testified that he first saw a copy of the leaflet a few minutes before midnight on July 20, 1964. He immediately examined the leaflets in the company of the top officials of the Hospital and one of the attorneys for Respondent, and it was decided not to issue a reply.

It should be noted that at the time Respondent had in its possession copies of Local 144's contracts with Jamaica and Doctors Hospitals. These contracts were referred to by Hospital officials at a series of 9 to 11 meetings dealing with the forthcoming election and conducted by Respondent among groups of employees during the month of July 1964, and preceding the election. According to Rowe, who had assisted in the preparation of the remarks to be made at these meetings with the employees, extracts of portions of the Doctors Hospital and Jamaica Hospital contracts were read to the assembled employees. Also according to Rowe, the employees at the meetings were shown the said contracts and were informed that they were available for their inspection. Rowe testified that he saw some of the employees examine the contracts.

How long the Hospital had in its possession the two contracts in question is not reflected in the record but it is clear that these contracts were physically in possession of the Hospital management for several weeks prior to the issuance of Local 144's "Special Edition." It is reasonable to assume, from the record as a whole, that the Hospital management, with its demonstrated thoroughness

and intense concern with any matter involving Local 144's election campaign, had carefully analyzed the contents of these contracts long before Local 144's "Special Edition" was brought to their attention, and knew in detail the extent of the wage increases and other benefits these contracts provided.

As to whether it was too late to prepare a reply to the statements made by Local 144, as claimed by Respondent, it should be noted that the Hospital prepared a reply to a telegram received by it from Local 144 in the mid-evening of July 20, 1964. The Hospital was able to have copies of its reply prepared and distributed to employees commencing at midnight of the same day. I am of the firm opinion that with the information it already had in its possession, a similar effort on the part of the Hospital management could have produced an adequate and timely reply to be distributed to the employees on the day before the election.

I conclude that Respondent had a sufficient opportunity to correct or rebut the main statements allegedly false in the "Special Edition", but elected not to avail itself of the opportunity to reply to Local 144.

In any event, I find that the leaflet in question was not sufficiently misleading to warrant setting aside the election and the certification based on the result of the election.

Conclusion

I find that Respondent has failed to sustain the burden of establishing that either the activities of Local 144 described in Respondent's election objections or the Board's conduct of the election, in fact constituted interference with

a free choice of a bargaining representative by the employees involved. In passing, it is well to note that despite the delay of some five years between the date when Respondent filed its election objections, during which the labor dispute between the parties pursued its litigious path through the courts, and in other proceedings, with the inevitable delay, and the date when Respondent received its "day in court" at this hearing, no prejudice was occasioned Respondent. Substantially the same evidence that Respondent originally relied on in support of its objections was considered by me in the instant case.

Accordingly, I find and conclude that since December 28, 1964, Respondent has failed and refused, and continues to fail and refuse, to bargain collectively with Local 144 as the exclusive bargaining representative of the employees in the appropriate unit and has thereby engaged in, and is engaging in, unfair labor practices within the meaning of Section 704 (6) of the Act.

VI. The Remedy

Having found that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 704 (6) of the Act, I will recommend that the Board, in accordance with the mandate of the Act, order Respondent to cease and desist therefrom.

Having found that Respondent had refused to bargain collectively with Local 144 as the exclusive bargaining representative of its employees in an appropriate unit, I will recommend for affirmative relief that Respondent be

directed, upon request, to bargain collectively with Local 144 as the exclusive representative of such employees, and, if an understanding is reached, to embody it in a signed agreement with Local 144.

I will further recommend that the Board order that the Certification of Representative issued by the Board in Cases Numbers SE-37117 and SE-38062, dated December 28, 1964, be extended for a period of one year from the date of the issuance of the Board's Decision and Order herein or from the completion of any judicial review thereof which may follow.[30]

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30. Section 19 of the Board's General Rules and Regulations provides as follows:

> "Certification; Life of; Exceptions: When a representative has been certified by the Board, such certification shall remain in effect for one year from the date thereof, and thereafter until such time as it shall be made to appear to the Board that the certified representative does not represent a majority of the employees within an appropriate unit. In any case where unusual or extraordinary circumstances require such action, or where probable cause is shown that such action be necessary to prevent the occurrence or continuation of an unfair labor practice, the Board, in its discretion, may shorten or extend the life of the original certification. When the Board shall find that during the life of a certification the employer has refused to bargain collectively with the certified representative, the time of the continuance of such refusal to bargain shall not be a part of the time limited in computing the life of the certification."

The reasonableness and validity of this Rule has been upheld and approved by the Court of Appeals in Florsheim Shoe Store Co., Inc. v. Retail Shop Salesmen's Union, 288 N.Y. 188, 197. Recently, in Roosevelt Hospital, 32 SLRB 398, the Board extended the life of a certification because of time consumed by collateral litigation concerning the construction of Section 716 of the Act involving this Respondent, as described above. The Board's order was confirmed and enforced unanimously, without opinion, by the Appellate Division, First Department, on December 9, 1969 (162 N.Y.L.J. No. 111 p. 2, 12/10/69) and affirmed by the Court of Appeals, opinion by Fuld, Ch. J., —— NY 2d —— on July 1, 1970, (164 N.Y.L.J. No. 33 p. 1, 8/17/70)

Appendix C

Because of the special circumstances of this proceeding, I will not recommend that Respondent be required to post an appropriate notice to its employees or to notify the Board within ten days what steps it has taken to comply with the provisions of the Board's Order.[31]

All of the foregoing I find is necessary to neutralize the effects of Respondent's unfair labor practice and to effectuate the policies of the Act.

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31. Wyckoff Heights Hospital, 32 SLRB 38; Roosevelt Hospital, 32 SLRB 398.

APPENDIX D

Order of Court of Appeals Denying Reargument

STATE OF NEW YORK

IN THE COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the eleventh day of October A. D. 1973.

Present,

Hon. STANLEY H. FULD, *Chief Judge, presiding.*

Mo. #613

In the Matter of the Petition of

The Long Island College Hospital,
Respondent-Appellant,

To review and set aside a decision and order of the New York State Labor Relations Board,
Appellant-Respondent,

Local 144, Hotel, Hospital, Nursing Home & Allied Service Employees Union, SEIU, AFL-CIO,
Intervenor-Appellant-Respondent.

A motion for reargument in the above cause having heretofore been made upon the part of the respondent-appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

[SEAL]

James M. Flavin
Clerk

APPENDIX E

Order Granting Motion to Amend Remittitur

STATE OF NEW YORK

COURT OF APPEALS

2 Mo. #950

In the Matter of the Petition of

The Long Island College Hospital,
Respondent-Appellant,

To Review and Set Aside a Decision and Order of the New York State Labor Relations Board,
Appellant-Respondent,

Local 144, Hotel, Hospital, Nursing Home & Allied Service Employees Union, SEIU, AFL-CIO,
Intervenor-Appellant-Respondent.

Motion to amend the remittitur granted. Return of remittitur is requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein, there were presented and necessarily passed upon questions under the Constitution of the United States, viz: whether the rights of the respondent-appellant under the Fifth and Fourteenth Amendments were denied. Respondent-appellant argued (1) that the Labor Board's appropriate unit determination was without rational basis and constituted

a denial of equal protection of the laws and (2) that the Board's refusal to allow the respondent-appellant to examine its confidential file developed as a part of its representation investigation—although the trial examiner had access to such file—constituted a denial of due process of law. The Court of Appeals considered these contentions and held that there were no violations of respondent-appellant's constitutional rights (see 32 N Y 2d 314).

APPENDIX F

Excerpts from Transcript of Hearing Before the State Labor Relations Board—Case No. SU 43142

[By Mr. Alfieri, Attorney for the Labor Board]

Q. Mr. Leary, after the order and direction of election in this matter, can you tell me what the procedure was? In other words, what did you do then? A. I am sorry. I didn't hear your question.

Q. After you received the copy of the order and direction of election, what is the procedure following that? A. In this particular case I had a pre-election conference.

Q. After your pre-election conference did you issue ballots or sample ballots? What did you do then? A. I issued notices of election, sample ballots.

Q. Mr. Leary, I show you Board's file in this matter and ask you if you will just go through there and see whether you can find—

Mr. D'Ablemont [Attorney for the Hospital]: I object. I don't know what he is handing to the witness. We don't have any Board's file to identify at all.

Trial Examiner: Your objection is well taken. I think if there is such a document it can be removed from the file, from the Board's confidential file.

Mr. D'Ablemont: I would like to look through that file. Can we look through it?

Trial Examiner: No, this is the Board's confidential file.

Mr. D'Ablemont: Are we destroying the confidentiality—

Trial Examiner: No. He is going to show, I assume, a paper that he wants to have the witness identify.

May I state for the record it is exactly the same file from which was extracted at your request the sample ballot and the ballot that was used in the maintenance—

Mr. Alfieri: That is what I wanted to say.

Mr. D'Ablemont: I didn't request that it be extracted from any confidential file. I would like to know what comprises the Board's confidential file. I think the record ought to be complete in this case.

Trial Examiner: I decline to give you that information. The term speaks for itself.

Mr. D'Ablemont: I think, Mr. Trial Examiner, for the record, in order for me to ascertain whether or not this or the papers that are in any file are properly identified as confidential, we ought to have some idea what constitutes that particular file.

Trial Examiner: I do not agree with you and I will permit Mr. Alfieri to take from that file any paper that he thinks should be offered in this hearing as being material to the issues involved herein.

Mr. Alfieri: Let me suggest one final thing.

Trial Examiner: I would be glad to hear any suggestion.

Mr. D'Ablemont: It seems to me that once the Board's attorney starts to pull from a file which has been labeled "confidential" some papers therein, shows them to a witness and/or gives them to me and offers them in evidence, I think we are entitled to see the entire file.

Trial Examiner: No, no more than Mr. Alfieri or Mrs. Vladeck would have the right to go through your attache case—

Mr. D'Ablemont: These are official papers.

Trial Examiner: They are not official papers. It has been held, I think in connection with the National Board proceedings that that which is confidential, a confidential file, is not available for scrutiny or examination by counsel.

Mr. D'Ablemont: May I suggest, Mr. Trial Examiner, and I will try to do it as promptly as I can—there has been a ruling that papers in the NLRB files are available to counsel if they are not in fact confidential.

Trial Examiner: Certain papers as affidavits which may contradict the witness' testimony, when those papers or documents or affidavits were given at about the time the witness spoke to Board's attorney or the General Counsel—

No, you will not be permitted to see the confidential file under any circumstances.

All right, Mr. Alfieri, you may continue.

Q. Mr. Leary, I show you this notice of election and ask you whether or not this is in fact a copy of the notice of election that was issued in connection with the ballots? A. Yes, it is.

Mr. Alfieri: I offer it in evidence.

Trial Examiner: Show it to Mr. D'Ablemont.

Any objection, Mr. D'Ablemont?

Mr. D'Ablemont: I have no objection. That is what it purports to be.

Appendix F

My continuing objection is that if we are going to pull any papers from a confidential file I am entitled to offer up any papers which I regard to be relevant. I have no objection that it is what it purports to be.

Trial Examiner: Mark it in evidence, please.

(Document referred to received and marked Board's Exhibit 17 in evidence.)

Trial Examiner: Any paper that you can identify and is perhaps in there which might be material to the issues involved in this proceeding, I shall assure you, Mr. D'Ablemont, once I have reached the conclusion that they are relevant, they will not be denied to you. That does not include any confidential memorandum made by the staff of the Board to the Board Members in connection with the proceeding during the informal stages.

Mr. D'Ablemont: The file has not been made accessible to me. I haven't seen any of the papers in the file.

Trial Examiner: You are not going to either.

Mr. D'Ablemont: How can I determine—

Trial Examiner: You already called for some papers and they were made available to you so you are able to identify them in any instance.

Mr. D'Ablemont: I didn't know where they came from. They were handed out to employees.

Trial Examiner: I think this witness testified that despite the fact that the original ballots were destroyed that there were probably copies of the

sample ballots and the ballots used at the election in the Board's file. The Board's file was sent for and those papers were extracted and made available for your use during this hearing.

• • •

By the Trial Examiner:

Q. Mr. Leary,* I show you Board's Exhibit 17 in evidence which is the notice of election you identified earlier, issued to the employees participating in the election held by the Board on July 22, 1964 and ask you was this only notice of election issued? A. For this election?

Q. For this election. A. Yes.

Q. Was there not a notice of election in Spanish issued? A. I am sorry—

Q. I don't know whether there was or not. A. There possibly was, and the reason I am pretty sure on this is that I had an election recently in Long Island College Hospital and there were Spanish notices so I am assuming, but I would have to see the file.

Q. Would the file so indicate? A. Yes, the file should show that.

Trial Examiner: Would you make that available to the witness, Mr. Alfieri, and see whether or not there was issued to the employees simultaneously with Board's Exhibit 17 in evidence a similar notice of election in the Spanish language.

Mr. Alfieri: May we go off the record.

Trial Examiner: Off the record.

(Discussion off the record.)

* The Labor Board employed Mr. Leary as its Labor Elections Supervisor.

Appendix F

Trial Examiner: In the off the record discussion Mr. Alfieri said that looking through the confidential file was a matter of considerable discussion before.

I would like to point out to counsel, including Mr. Alfieri that what was issued to employees does not carry with it any confidential characterization.

Mr. Alfieri: That is true.

Q. Mr. Leary, do you want to look through the file and pick that out if there is such a document? A. Yes, there is.

Trial Examiner: Pick it out.

Mr. D'Ablemont: I of course register my continuing objection to this dipping into a confidential file which I may not see.

Trial Examiner: Yes, you have an exception.

* * *

Mrs. Vladeck [Attorney for Local 144]: I have no further questions.

I am going to ask that the Board take official notice of its own files in The Long Island College Hospital Case No. SE-37117, and ask that it refer to a letter dated March 27, 1964 in which Local 144 advised it that there was no agreement existing between Local 144 and the Maintenance Division of Building and Construction Trades Council.

Trial Examiner: Was a copy of that communication sent to counsel for the respondent or the hospital itself simultaneously with the filing of that communication with the Board?

Mrs. Vladeck: There is no indication that that was done but the letter of March 27, 1964 refers

to a telegram which had been sent in connection with the Wyckoff Heights Hospital Case and the Society of New York Hospital Case in which the same statement had been made. The letter itself does not reveal whether copies were sent to counsel for the hospital and I would therefore assume that none was.

Trial Examiner: I would prefer, Mrs. Vladeck, that in order to have the record complete that any such communication be received in evidence rather than have it repose in the Board's file and have the Board take official notice. It put other counsel under a bit of a handicap in making reference to something which isn't in evidence.

Mrs. Vladeck: May we go off the record?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: Are you offering these documents, Mrs. Vladeck?

Mrs. Vladeck: I would be glad to offer them.

Mr. D'Ablemont: Mr. Trial Examiner, I have in my hand the documents to which Mrs. Vladeck referred in her statement a few moments ago. I believe in describing them she stated that Local 144 had given notice. I see that one is apparently a copy of a telegram from Vladeck, Elias, Frankel & Vladeck, not from Local 144, to the New York State Labor Relations Board in connection with the Wyckoff Heights Hospital Cases and the Society of New York Hospital Cases. The other is a letter

dated March 27, 1964, referring to the telegram, and the letter is in The Long Island College Hospital Cases apparently, Case No. SE-37117.

The only thing that disturbs me, Mr. Trial Examiner, is that we spent many hours in attempting to make complete in this hearing the Board's record in the representation case, the SE case. We went through and had the Board's attorney put in all the voluminous documentation and I don't believe, Mr. Trial Examiner, that anywhere in the Board's record of the representation case involving The Long Island College Hospital is there either a copy of the telegram or a copy of this letter.

Trial Examiner: I would think that that lack is now being supplied—

Mr. D'Ablemont: Mr. Trial Examiner, Mrs. Vladeck is offering these merely to—in your words, I recall it was on the record and off the record—to prevent the Board from digging out from their files or taking official notice of something that is in their files. I merely have reference to the fact that I am not sure it was in their files in The Long Island College Hospital and considered by the Board back in 1964. If it is part of the Board's record in the E case, in The Long Island College Hospital, I say it ought to be made part of the record.

Mrs. Vladeck: I agree, I don't know whether the imputation of carelessness is a reference to the Board or to me. So far as I know, these are copies of letters which were sent, not only by my office but

in one case, signed by me personally so that I represent that these were sent to the Board; whether they have been properly filed or not, I can hardly say.

Trial Examiner: I didn't anticipate any need for these documents, I would say, until that issue was put in evidence by Mr. D'Ablemont on examination of this witness during which he brought out such facts that related to the arrangement made with the Maintenance Division. Until that time there wasn't any basis for offering these documents in evidence to complete, as you say, the entire representation case that was before the Board at the time the Board considered its decision. I don't know if I make myself clear.

Mr. D'Ablemont: I think these documents may be relevant but I am not sure they can be admitted into evidence under the offer of Mrs. Vladeck. Perhaps we need something from the Board to say that they were received and to explain why they were not part of the Long Island College Hospital in the E case.

Trial Examiner: I don't know that there should be any great mystery about this, Mr. Alfieri. If you have such documents I am sure they will bear a stamp mark as to when they were received and I think you should make them available to Mrs. Vladeck, if she wants to offer them, or you want to offer them, and that would dispel any doubt as to whether or not the Board ever got it.

Mrs. Vladeck: May I suggest that these documents be held by the reporter pending the resumption of hearings and we will then determine how to mark them, if at all.

Trial Examiner: Have them marked for identification.

I am not receiving them in evidence, Mr. D'Ablemont, at this moment.

Mr. D'Ablemont: Fine.

Let me elucidate further, if I may. I am not only concerned whether or not the Board received them but of much greater concern is if the Board did receive them it ought to have been part of the record handed to you, Mr. Trial Examiner, part of the Board's case in the representation case, and if that particular document were received by the board and is not part of that record because the Maintenance Division petition in March was an issue of a motion by the hospital, was an issue of real concern to Local 144's counsel and counsel for the hospital—I am merely conjecturing on the record—I wonder what other papers may also be missing from the record because I have not been permitted the right to examine the Board's file which I have requested many times.

Trial Examiner: Your statement is spread on the record. I will not answer it.

Mark these as Union's Exhibit for identification.

(Documents referred to marked Union's Exhibit 6 for identification.)

* * *

Appendix F

Mr. D'Ablemont: Mr. Trial Examiner, one of our objections throughout the entire proceeding has been the Board's denying us a hearing on our objections to the election. I assume the Board did it under the rule of law that an administrative agency, as Mr. Alfieri pointed out so well, need not hold a formal hearing unless the objections raise material and substantial issues of fact and law. We are familiar with that rule of law. We merely say that on the basis of the record in this proceeding that we believe respondent on or about December 1964 did raise substantial and material issues of fact and law and that we would urge the Board now to reconsider its denials to the hospital, the respondent in this case, of a hearing at which it could adduce testimony and further exhibits in support of its objections. The Board denied us this right back in 1964. We respectfully request this Trial Examiner to reconsider that ruling.

In this regard, Mr. Trial Examiner, I have had subpoenaes issued by the Board pursuant to my application. I would like to have the applications and the subpoenaes at this time marked for identification and then I would like to make a motion and seek a determination from you as to how we are to proceed, if I may do that.

Trial Examiner: I have no objection. You are offering them to be marked for identification?

Mr. D'Ablemont: Yes, only for identification.

(Documents referred to marked Respondent's Exhibits 5-A, 5-B, 6-A and 6-B, respectively, for identification.)

Trial Examiner: Yes, Mr. D'Ablemont?

Mr. D'Ablemont: Mr. Trial Examiner, I refer you to Respondent's Exhibits marked for identification, 5-A, which is an application for subpoena duces tecum and ad testificandum for the State Labor Relations Board, requesting Mr. Ottley, President of Local 144, to appear and give testimony and produce certain documents as related in the application for the subpoena, and to 5-B for identification which is the subpoena the Board issued to Mr. Ottley the 10th day of June, 1969.

I refer the Trial Examiner to Respondent's Exhibits 6-A for identification which is the respondent's application to the State Labor Relations Board for a subpoena duces tecum and ad testificandum directed to Richard J. Leary as Labor Election Supervisor of the New York State Labor Relations Board, requesting him to appear here today and to give testimony and to bring certain stated documents with him, and to Respondent's 6-B for identification which is the subpoena dated June 9, 1969, issued by the Board to Mr. Leary, and to affidavit of service of said subpoena dated June 10, 1969 by Mr. Paul J. Derkasch.

Going back to Respondent's Exhibit 5-B for identification there is also an affidavit of service by Mr. Paul J. Derkasch dated June 10, 1969 in which Mr. Derkasch states he served Mr. Ottley's secretary with a subpoena.

Mr. Trial Examiner, the purpose of these subpoenaes ad testificandum is to produce in this case testimony that took place on and before the election

among the maintenance employees that the State Labor Relations Board conducted on July 22, 1964 at the Long Island College Hospital.

I have other witnesses which I wish to bring to give testimony concerning the events set forth in respondent's objections to the election and in paragraph 6, subdivisions (a) through (i) of respondent's amended answer to the complaint herein. I would like to get a ruling at this time, knowing the policy of the Board which on occasions is not to permit "re-litigation" in a labor practice proceeding those matters which may have been brought up in a representation proceeding, and in order to save witnesses' time and to expedite this proceeding. I would like to get a ruling as to whether or not you are going to permit me to have these people come here to give testimony because this is exactly what I wish them to give, concerning those events which took place on the day of the election and prior to the election which forms the substance of the complaint herein and concerning which the Board did not permit us to elicit testimony when we filed our objections to the election.

Trial Examiner: Do you wish to be heard, Mr. Alfieri?

Mr. Alfieri: Yes.

With respect to Mr. D'Ablemont's request to now have an oral hearing on the objections, the respondent had this opportunity to present its evidence to the Board. The Board considered what was submitted to it. The Board acting in its discretion as provided for in Rule 17, made its determination

without the need of a formal hearing. With respect to respondent's request to now throw open the representation matter and elicit testimony, I say the place for the submission of evidence in a representation matter is in the representation matter and has no place in the unfair labor practice case. The respondent has time and again said that it seeks to have a review of the Board's determination—a judicial review of the Board's determination in the representation case and I say that the proper place, when it seeks its determination, is at enforcement, if we must come to enforcement, it can then have a determination in the court with respect to the Board's finding and its motion and request should be denied.

Trial Examiner: Mrs. Vladeck, do you wish to be heard?

Mrs. Vladeck: I would like to note that while the unfair labor practice proceeding here is relatively young, that the petition in this case was filed just slightly under six years. If we follow the suggestions of the hospital that we now resurrect its objections to the election and have a full dress hearing with witnesses, it is possible that the hospital could keep us for another six years before we can get bargaining in the unit for which we have been certified.

Trial Examiner: I am ready to rule. I grant the respondent's application and I will take testimony in support of the objections filed by the respondent to the results of the election in the maintenance unit in 1964.

• • •

SUPREME COURT, U. S.
FEB 14 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1081

THE LONG ISLAND COLLEGE HOSPITAL,
Petitioner,

against

NEW YORK STATE LABOR RELATIONS BOARD,

and

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED SERVICE EMPLOYEES UNION, SEIU, AFL-CIO,
Respondents.

BOARD'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	PAGE
Counter-Statement of the Case	2
Point I—The petition for a writ of certiorari is defective on its face for failure to comply with Rule 23(1)(f)	6
Point II—No substantial constitutional issue was presented to, or argued before, the New York Court of Appeals	7
Point III—The Board did not deny the Hospital "equal protection of the laws" in finding appropriate a unit of skilled maintenance employees	8
A. The Law	8
B. The Facts	10
1. Private, Profitmaking Hospitals	11
2. Educational Institutions	13
C. Conclusion	14
Point IV—The Hospital was not denied "procedural due process of law" in relation to the Board's confidential file in the representation proceeding	15
A. Examination of the File	15
B. Use of the File	17
C. Conclusion	19
Conclusion—The petition for a writ of certiorari should be denied	19

Index to Appendices

PAGE

A—Excerpts from the Board's Decision in Wyckoff Heights Hospital 1a

B—Excerpts from the Hospital's Main Brief to the New York Court of Appeals 6a

C—Excerpts from the Hospital's Answering Brief to the New York Court of Appeals 8a

D—Excerpts from Transcript of Record Before the Board 12a

TABLE OF AUTHORITIES

Cases:

Butte Medical Properties (Medical Center Hospital), 168 NLRB 266 (1967) 11

Cornell University, 32 NYSLRB 202 (1969) 13
Cornell University, 183 NLRB No. 41, 74 LRRM 1269 (1970) 13
Council 19, AFSCME v. N.L.R.B., 296 F. Supp. 1100 (N.D. Ill., 1968) 8

Duke University, 200 NLRB No. 13, 18 LRRM 1488 (1972) 13

Garner v. Louisiana, 368 U.S. 157 (1961) 18
Gordon v. U.S., 344 U.S. 414 (1953) 17

Hayes Seventy-Third Corp. (Physicians Hospital), 26 NYSLRB 428 (1963) 12
House of the Holy Comforter, 26 NYSLRB 437 (1963) 12

Jencks v. U.S., 353 U.S. 657 (1957) 17

PAGE

Lawrence Hospital, 28 NYSLRB 552 (1965) 10, 13
Le Moyne College, 33 NYSLRB 270 (1970) 13
Long Island College Hospital (The), 27 NYSLRB 405 (1964) 10, 20
Long Island College Hospital (The) v. Catherwood, 23 N Y 2d 20 (1968), *appeal dismissed,* 394 U.S. 716 (1969) 5

May Department Stores v. N.L.R.B., 326 U.S. 376 (1945) 9

N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944) 9
N.L.R.B. v. Jones & Laughlin Steel Corp., 331 U.S. 416 (1947) 9
N.L.R.B. v. Monroe Auto Equipment Company, 470 F. 2d 1329 (1972) 15
New York University, 32 NYSLRB 425 (1969) 13, 14

Packard Motor Co. v. N.L.R.B., 330 U.S. 486 (1947) 9
Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146 (1941) 9
Polymers, Inc. v. N.L.R.B., 414 F. 2d 999 (1969), *cert. den.,* 396 U.S. 1010 5
Post College, C. W., 33 NYSLRB 274 (1970) 13

St. John's Queens Hospital, 26 NYSLRB 529 (1963) 13
St. Luke's Memorial Hospital Center, 30 NYSLRB 234 (1967) 12
Society of The New York Hospital (The), 34 NYS LRB 486 (1971) 10
Society of The New York Hospital (The) v. N.Y.S. L.R.B., 40 (N.Y.) A D 2d 603 (1972) 10
Stork Restaurant, Inc. v. Boland, 282 N.Y. 256 (1940) 7

University Hospital, 30 NYSLRB 259 (1967) 14

PAGE

Westchester Square Hospital, 25 NYSLRB 532 (1962) 12
Westchester Square Hospital, 29 NYSLRB 325 (1966) 12
Winkler Enterprises, Inc., 27 NYSLRB 121 (1964) 12
Wyckoff Heights Hospital, 27 NYSLRB 75 (1964) ....4, 11, 12, 14, App. A
Wyckoff Heights Hospital, 30 NYSLRB 254 (1967) 12

Constitutional Provisions, Statutes and Rules Involved

Constitution of the United States, U.S.C. Const. Amend. 14 .....2, 6, 7, 8, 10, 14, 15, 19

National Labor Relations Act, as amended, 29 U.S.C. §152 (2) 8

New York State Labor Relations Act (30 McKinney's Consolidated Laws of New York (Labor Law)
§700 *et seq.* 7, 20
§707 (2) 7
Amendment, L. 1963, ch. 515 .....3, 19, 20

United States Supreme Court Rules
§23 (1) (f) 2, 6
§23 (4) 2

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Respondents.

BOARD'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondent, New York State Labor Relations Board (herein called the Board), submits this brief in opposition to the petition for a writ of certiorari to the Court of Appeals of the State of New York filed by The Long Island College Hospital (herein called the Hospital).

The Board contends that:

1. The Hospital has failed to comply with this Court Rule 23 (1) (f).
2. No *substantial* constitutional issue either was raised in the New York Court of Appeals or is now tendered to this Court for disposition.
3. The Board did not deny the Hospital equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution in finding that the Hospital's skilled maintenance employees constitute an appropriate bargaining unit.
4. The Board did not deny the Hospital procedural due process of law in contravention of the Fourteenth Amendment to the United States Constitution in connection with the Board's confidential file in the representation proceeding.

Counter-Statement of the Case

The Hospital's purported "Statement of the Case" at pp. 4-11 of its petition[1] is so replete with irrelevancies, equivocations, innuendoes, distortions, half-truths, and outright misstatements of the record and the findings below,[2] that unfortunately it becomes necessary for the Board to set forth this Counter-Statement of the Case setting forth the facts needed for this Court's consideration of the only

1. "H. Ptn. p. —" refers to pages in the Hospital's petition for a writ of certiorari docketed with the Clerk of this Court on January 9, 1974. References to the Appendix thereto have the suffix "—a".

2. See this Court's Rule 23 (4).

issues raised upon this petition. It is neither necessary, nor would it be helpful to this Court, to attempt to enumerate, clarify or rectify all of these, although a few of the more glaring examples will be noted in passing. Most of the instances involve the Hospital's efforts to reargue the contentions it had made below upon purely state issues which already have been decided adversely to it by the Board and the State Courts, and are not now before this Court for further review.

This matter has been in litigation for almost 11 years. It began as a representation proceeding before the Board on July 1, 1963, the day the Board acquired jurisdiction over non-profitmaking hospitals by N. Y. Laws of 1963, ch. 515. Even before that date, the Board had conducted a general public hearing on June 13, 1963, concerning the problems involving appropriate bargaining units at hospitals; written and oral opinions of both employers and unions in the field were received. During 1963 and 1964, in several representation proceedings, including this one, the Board conducted lengthy hearings at which the parties were afforded an opportunity to adduce evidence relating to these unit issues and to make a full record. The Board also considered memoranda from the various parties.

Following a thorough consideration of all of the foregoing, the Board concluded that generally there should be 5 basic units in the hospital industry, namely: (1) service and maintenance, (2) technical, (3) office-clerical, (4) registered professional nurses, and (5) licensed practical nurses. The Board further recognized that special problems are presented concerning skilled maintenance em-

ployees. For reasons fully set forth in its decision in *Wyckoff Heights Hospital,* 27 NYSLRB 75, 80-83 (1964), quoted in Appendix A hereof, the Board concluded that skilled maintenance employees in hospitals should be afforded an opportunity to bargain in a separate unit if they wish to do so. The Board has followed that practice consistently since 1964. (See, for example, the cases cited in the Appendix of the Hospital's petition, p. 28a, footnote 2).

The Board thereupon conducted a self-determination election among the Hospital's skilled maintenance employees who voted: (1) to bargain in a separate unit limited to skilled maintenance employees,[3] and (2) to be represented for the purposes of collective bargaining by Local 144, Hotel, Hospital, Nursing Home & Allied Service Employees Union, SEIU, AFL-CIO, herein called the Union.[4]

The Hospital filed objections to the election upon which the Board conducted an informal investigation, and con-

3. The statement on p. 6 of the Hospital's petition that "* * * a majority of the maintenance employees voting in the election did not 'signify a desire to bargain separately', * * *" is an outright falsehood. The Court of Appeals in sustaining the Board, held: "* * * the valid votes were 21 'yes' to 5 'no' * * *" (H. Ptn. p. 10a). See the extensive discussions of this point below in the Appendix to the Hospital's petition, pp. 65a-67a (Trial Examiner's Intermediate Report), 38a-39a (Board's Decision and Order), 20a (Appellate Division's Opinion), 22a (Dissenting Opinion at Appellate Division), and 10a-11a (Court of Appeals' Opinion). Moreover, this misstatement is in no way relevant to, or a basis for, the petition for a writ of certiorari now before this Court.

4. Similarly false is the related statement on pp. 6 and 14 of the Hospital's petition that the Union was selected as bargaining representative by "a one vote margin." The Union won by 4 votes. (See discussion of this matter below in the Appendix to the Hospital's petition, pp. 51a-52a (Trial Examiner's Intermediate Report), 39a (Board's Decision and Order), 20a-21a (Appellate Division's Opinion), 22a (Dissenting Opinion at Appellate Division), and 10a-11a (Court of Appeals' Opinion).)

cluded either: (1) that the objections were insufficient on their face, or (2) that there was insufficient *prima facie* evidence to warrant a hearing.[5] The Board overruled the objections and issued its formal certification of representatives on December 28, 1964.

Years of litigation ensued over procedural matters not at issue upon this petition. See *The Long Island College Hospital* v. *Catherwood,* 23 N Y 2d 20 (1968), appeal dismissed, 394 U.S. 716 (1969). The Union thereafter filed an unfair labor practice charge alleging the Hospital's refusal to bargain with the Board. The Board issued its complaint, held hearings, and eventually issued its bargaining order (H. Ptn. Appendix pp. 26a-80a). During this hearing, the Board afforded the Hospital an opportunity to adduce evidence in support of its election objections which the Board had earlier overruled following its informal investigation.[6]

The Hospital thereupon instituted in the Appellate Division of the Supreme Court of the State of New York, Second Department, a judicial review of the proceedings before the Board. The Board cross-petitioned for enforcement of its bargaining order. For reasons not here material, the Appellate Division (one Justice dissenting) annulled the Board's order, denied the Board's cross-petition for enforcement thereof, and directed that a new election be conducted among these employees (H. Ptn. pp. 20a-25a).

5. No formal hearing is required upon election objections unless a factual issue is raised which, if true, would warrant setting aside the election. *Polymers, Inc.* v. *N.L.R.B.,* 414 F. 2d 999 (1969), cert. den. 396 U.S. 1010.

6 This was not the usual "unfair labor practice" hearing, the refusal to bargain being conceded, but essentially a hearing upon the Hospital's election objections, a constituent part of the representation proceeding. (See H. Ptn. pp. 7-8, 12; see also p. 97a.)

All parties appealed to the Court of Appeals, the State's highest court. In an Opinion by Chief Judge Stanley H. Fuld, speaking for an unanimous bench, the Court fully sustained the findings of the Board and enforced its bargaining order in its entirety (32 N Y 2d at 314; H. Ptn. pp. 1a-19a). The Court of Appeals thereafter denied the Hospital's motion for reargument (H. Ptn. p. 81a). It also granted the Hospital's motion to amend the remittitur to recite that the Court had considered and passed upon questions under the Constitution of the United States and held that there was no violation thereof (H. Ptn. pp. 82a-83a).

POINT I

The petition for a writ of certiorari is defective on its face for failure to comply with Rule 23 (1) (f).

This Court's Rule 23 (1) (f) requires that the petition specify certain details as to the time, place, and manner in which "the federal questions sought to be reviewed were raised."

The "Statement of the Case" at pp. 4-11 of the Hospital's petition nowhere complies with the requirements of this rule. The general, self-serving statement in the 4th paragraph of p. 10 is insufficient.

Moreover, the excerpts from the transcript of the hearing before the Board quoted at pp. 84a-97a of the Hospital's petition do not reveal that any questions under the Fourteenth Amendment of the United States Constitution

were raised before the Board. Section 707 (2) of the New York State Labor Relations Act, providing for judicial review of final orders of the Board, specifically states "no objection that has not been urged before the board, its member, agent or agency, shall be considered by the court * * *" (30 McKinney's Consolidated Laws of New York (Labor Law, §707 (2)). In New York State, this includes constitutional issues. *Stork Restaurant, Inc.* v. *Boland,* 282 N.Y. 256, 266 (1940).

Accordingly, the Hospital has failed to establish that it properly raised any constitutional issues in the proceeding before the Board, or preserved them for review by this Court.

POINT II

No substantial constitutional issue was presented to, or argued before, the New York Court of Appeals.

The Hospital had filed two briefs in the Court of Appeals: (1) its main brief upon its own cross-appeal; and (2) its answering brief to the Board's brief. In each of these it set forth both its "argument" and the "questions involved." These are reproduced in the Appendices hereto: excerpts from the Hospital's main brief in Appendix B, and excerpts from the Hospital's answering brief in Appendix C.

A reading of these clearly demonstrates that the constitutional issues sought to be reviewed by this petition were not presented to, or argued before, the Court of Appeals. The Fourteenth Amendment was never mentioned as an issue which the Hospital was tendering to the

Court of Appeals for determination or as a ground for reversing the Board's bargaining order.

The few references to the Fourteenth Amendment scattered in the body of the Hospital's briefs below were merely tossed in "for whatever they were worth," and did not serve to present for serious consideration by the Court of Appeals any real or substantial issues under the United States Constitution which are now worthy of, or ripe for, consideration by this Court. The Hospital's own casual and cavalier treatment of any constitutional issue below demonstrates that it was not seriously pressing such grounds as a viable basis for attacking the Board's bargaining order.

POINT III

The Board did not deny the Hospital "equal protection of the laws" in finding appropriate a unit of skilled maintenance employees.

A. The Law

There is no constitutional requirement that labor relations boards find exactly the same appropriate bargaining unit at every establishment even within the same industry, much less in different industries. None of the cases cited at pp. 20-22 of the Hospital's petition supports any such assertion.[7]

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7. The sole labor relations case cited, *Council 19, AFSCME* v. *N.L.R.B.*, 296 F. Supp. 1100 (N.D. Ill., 1968), at p. 21 of the Hospital's petition—a district court decision hardly controlling upon this Court—did not involve appropriate bargaining units, the issue upon which certiorari is sought here. It was an attempted declination of jurisdiction by the National Board contrary to the express provisions of the statute. (29 U.S.C. §152 (2).) No appeal was taken from the District Court's holding. (296 F. Supp. at p. 1106.)

A long line of decisions of this Court has settled that labor relations boards, in the exercise of their expert judgment, are vested with a broad discretion in establishing collective bargaining units. See, for example, *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 152-153 (1941); *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 134 (1944); *Packard Motor Co.* v. *N.L.R.B.*, 330 U.S. 486, 491 (1947); *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 422 (1947). Judicial review of unit findings is narrowly circumscribed, the test being whether the Board was arbitrary and capricious. *May Department Stores* v. *N.L.R.B.*, 326 U.S. 376, 380 (1945); *Packard Motor Co.* v. *N.L.R.B.*, 330 U.S. 486, 491 (1947). That is what the New York Court of Appeals held in sustaining the Board's unit finding here (H. Ptn. pp. 3a-7a).

The Hospital's contention, if accepted, would virtually put an end to the work of labor relations boards in connection with appropriate bargaining units. According to the Hospital, once a certain unit is found at a single establishment, exactly the same unit must thereafter be found at every other establishment not only in the same industry but in all possibly related fields. This freezing of bargaining units into an inflexible, rigid mold would stultify administration of the labor relations acts not only in New York State, but in several other states as well as at the National Labor Relations Board.

This Court has never held, and should not now hold, that identical bargaining units must be found appropriate

in every situation.[8] Thus, no question is presented under the Fourteenth Amendment to the United States Constitution by virtue of the Board's unit finding.

B. The Facts

The Hospital has sought to convey an entire inaccurate picture of the Board's practice in finding appropriate bargaining units of skilled[9] maintenance employees at hospitals. The Hospital suggests at p. 5 of its petition that The Long Island College Hospital is the only one at which the Board has found appropriate a unit of skilled maintenance employees.[10] (See also pp. 3, 17). That is untrue.

8. It is fascinating to compare *The Society of The New York Hospital*, 34 NYSLRB 486, 488-498, 508-513 (1971), represented by the same attorneys as The Long Island College Hospital. The New York Hospital is making virtually the same contentions as are urged upon this petition and, at the same time, strenuously objecting to the appropriateness of a unit of skilled maintenance employees, the same as that found by the Board at numerous other non-profit-making hospitals. The New York Hospital insists that a *different* unit must be found at *that* hospital. Indeed, it has persuaded the Appellate Division of the Supreme Court, First Judicial Department, to remand that proceeding to the Board for still further hearings on the unit issue. *The Society of The New York Hospital* v. *N.Y.S.L.R.B.*, 40 (N.Y.) A D 2d 603 (1972), appeal pending in the Court of Appeals. One cannot help but wonder whether these hospitals are seriously litigating genuine legal and constitutional issues, or merely playing tiddly winks!

9. The Hospital incorrectly describes the employees here involved as "unskilled" (H. Ptn. p. 5). That is not the state of the record before this Court. The Board found that these are "skilled" maintenance employees (H. Ptn. pp. 27a-28a; *The Long Island College Hospital*, 27 NYSLRB 405, 410-411 (1964)) and both the Appellate Division (H.Ptn. p. 20a) and the Court of Appeals (H. Ptn. pp. 3a, 5a-7a) have affirmed that finding. Certiorari is not sought therefrom (H. Ptn. p. 3). Indeed, at p. 10 of the Hospital's petition, it acknowledges that these are "skilled" maintenance employees!

10. *Lawrence Hospital*, 28 NYSLRB 552 (1965), relied upon by the Hospital at p. 5 of its petition, has no application to the issue now before this Court. There the Board did not refuse to find that "skilled" mainenance employees constitute an appropriate bargaining unit. Rather, the finding was that this small hospital did not employ any "skilled" maintenance employees, only handymen.

In a long line of cases commencing with *Wyckoff Heights Hospital,* 27 NYSLRB 75, 80-83 (1964), the Board has consistently found appropriate bargaining units of skilled maintenance employees at hospitals. Some examples are set forth in footnote 2 of the Board's Decision and Order herein, on p. 28a of the Appendix to the Hospital's petition. The Board continues to find such units appropriate. Indeed, this practice has been accepted by virtually the entire hospital industry in New York State, except for this Hospital and one or two others. Significantly, many such elections have been conducted by the Board upon consent of the parties.

1. Private, Profitmaking Hospitals

Wholly misleading and equivocal is the statement on p. 17 of the Hospital's petition that the Board "has never found" appropriate a unit of skilled maintenance employees at private, profitmaking hospitals. The correct statement would be that the Board "has never *refused* to find" appropriate such a unit. The simple fact is that during the period of time this Board had jurisdiction over private, profitmaking hospitals,[11] no petition had ever been filed with the Board seeking a unit limited to skilled maintenance employees.[12] That is true of all the cases cited on p. 17 of the Hospital's petition.

11. The National Labor Relations Board, reversing its prior practice, asserted jurisdiction over private, profitmaking hospitals in 1967: *Butte Medical Properties (Medical Center Hospital)*, 168 NLRB 266.

12. The Board does not find that skilled maintenance employees constitute an appropriate bargaining unit at hospitals unless: (1) a petition is filed seeking such a unit, and (2) the employees vote in a self-determiniation election to bargain as a separate unit. See the Board's decision in *Wyckoff Heights Hospital,* 27 NYSLRB 75, 80-83 (1964) quoted in Appendix A hereof, below.

The repeated statement at pp. 3, 5, 17, 20-22 of the Hospital's petition that the Board applies "different standards" to its unit determinations in private, profitmaking hospitals and in non-profitmaking hospitals is simply untrue. To the contrary, over the years the Board has treated the two types of hospitals interchangeably, frequently citing decisions in one type as a basis for its finding in the other. It has done so, for example, as to the following types of units: service and maintenance,[13] registered professional nurses,[14] and licensed practical nurses.[15] As stated earlier, the only reason it had not heretofore found a separate unit of skilled maintenance employees at private, profitmaking hospitals is that since its 1964 decision in *Wyckoff Heights Hospital,* 27 NYSLRB 75, 80-83 (1964), no petition has been filed with this Board seeking that unit. If such a petition were filed, undoubtedly it would be dealt with in the same manner the Board has handled similar petitions at non-profitmaking hospitals.

Clearly, then, there is no basis for the Hospital's wholly unfounded contention that the Board has found appropriate a unit in this case different from what it would find at a private, profitmaking hospital.

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13. Compare *Hayes Seventy-Third Corp. (Physicians Hospital),* 26 NYSLRB 428, 430-431 (1963) (private, profitmaking hospital), with *House of the Holy Comforter,* 26 NYSLRB 437, 440 (1963), (non-profitmaking hospital).

14. Compare *Westchester Square Hospital,* 25 NYSLRB 532, 535-538 (1962) (profitmaking hospital), with *St. Luke's Memorial Hospital Center,* 30 NYSLRB 234 (1967) (non-profitmaking hospital).

15. Compare *Westchester Square Hospital,* 29 NYSLRB 325 (1966), and *Winkler Enterprises, Inc.,* 27 NYSLRB 121, 129 (1964) (profitmaking hospital and nursing home), with *Wyckoff Heights Hospital,* 30 NYSLRB 254, 257 (1967) (non-profitmaking hospital).

2. *Educational Institutions*

Even falser is the statement on p. 17 of the Hospital's petition that the Board "has never found" appropriate a unit of skilled maintenance employees at educational institutions. That the Hospital knows full well this statement is not true is shown by its addition of the word "contested" (H. Ptn. pp. 5, 17).

The Board has certified units of skilled maintenance employees at educational institutions,[16] and has applied the same standards as at hospitals.[17] Similarly, the National Labor Relations Board also finds appropriate units of skilled maintenance employees at educational institutions.[18]

The statement at pp. 3, 5, 17, 20-22 of the Hospital's petition that the Board applies "different standards" to non-profitmaking hospitals and to educational institutions is entirely without foundation. Indeed, the overall policy consideration of avoiding undue "compartmentalization" at educational institutions, as quoted on p. 19 of the Hospital's petition from the Board's decision in *New York University*, 32 NYSLRB 425, 430 (1969) is a policy earlier enunciated in cases involving non-profitmaking hospitals! See, for example, *St. John's Queens Hospital*, 26 NYSLRB 529, 532 (1963), which was itself quoted in the Board's *New York University* decision.

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16. See, for example, *Cornell University*, 32 NYSLRB 202, 203 (1969); *C. W. Post College*, 33 NYSLRB 274 (1970).

17. Compare *LeMoyne College*, 33 NYSLRB 270 (1970), with *Lawrence Hospital*, 28 NYSLRB 552, 554 (1965).

18. See, for example, *Duke University*, 200 NLRB No. 13, 81 LRRM 1488 (1972); *Cornell University*, 183 NLRB No. 41, 74 LRRM 1269 (1970).

Once again, the cases cited and quoted from at pp. 18-19 of the Hospital's petition did not involve petitions seeking a unit of skilled maintenance employees. Indeed, at *New York University,* 32 NYSLRB 425 (1969), quoted from at p. 19, a separate unit of skilled maintenance employees has been in existence since at least 1939.[19]

C. Conclusion

The Hospital's repeated statement (H. Ptn. pp. 3, 5, 20-22) that there is no "rational basis" for the unit the Board has found here is entirely baseless. The Board fully set forth its reason for establishing separate units of skilled maintenance employees under appropriate circumstances in *Wyckoff Heights Hospital,* 27 NYSLRB 75, 80-83 (1964), quoted in Appendix A hereof, below.

The Hospital concedes at pp. 20-22 of its petition that when a rational basis does exist for any distinctions which happen to be made (and there are no such distinctions here), then there is no violation of "equal protection" rights under the Fourteenth Amendment to the United States Constitution.

It is clear from the foregoing that no reason exists for granting certiorari on this issue as requested at p. 3 of the Hospital's petition.

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19. See *University Hospital,* 30 NYSLRB 259, 265 (1967).

POINT IV

The Hospital was not denied "procedural due process of law" in relation to the Board's confidential file in the representation proceeding.

There is no merit to the Hospital's contentions either: (1) that it had a constitutional right to conduct a "fishing expedition" through the Board's confidential file in the representation proceeding during the hearing upon the Hospital's election objections; or (2) that the Trial Examiner used "secret" information from that file when making recommended findings in his Intermediate Report.

A. Examination of the File

One of the few correct statements in the Hospital's petition is that the Board would not permit the Hospital to have possession of or to examine the Board's confidential file in the representation proceeding (H. Ptn. pp. 3, 8, 11, 12, 14). That file was not made available to the Union either (see excerpt from the minutes of hearing set forth in Appendix D hereof, below). Nor was it in the possession of the Trial Examiner (see sub-section "B," below). Throughout the hearing, the Board's litigation attorney[20] con-

20. The Hospital's continual reference to the Board's litigation attorney as a "prosecutor" is both inaccurate and an obvious effort to arouse prejudice (H. Ptn. pp. 3, 8, 11-13). This was not a criminal prosecution. It was a quasi-legislative and quasi-judicial investigation under a remedial statute. Indeed, since the hearing was primarily upon the Hospital's own objections to the election (footnote 6, above), the Hospital had the burden of proof on those issues and was, if there is any analogy, the "prosecutor" in this matter. *N.L.R.B.* v. *Monroe Auto Equipment Company*, 470 F. 2d 1329, 1333 (1972).

trolled that file (H. Ptn. pp. 3, 8, 11, 12, 14; Appendix pp. 84a-97a; Appendix D hereof, below).

The reason that the Board's litigation attorney was going through the Board's confidential file in the representation proceeding was to locate, for the purpose of marking in evidence, various formal documents in the representation proceeding; the Hospital already had copies of these. This appears clearly from the excerpts of the minutes of hearing set forth in the Appendix to the Hospital's petition, at pp. 84a-89a. See also Appendix D hereof, below. These documents included, for example, the Board's Decision and Direction of Election, the notices of election,[21] the sample ballots, the official ballots, the reports of count, the election objections filed by both parties, the Board's orders overruling all the objections, the certification of representatives, etc. These related to matters about which there was no factual or testimonial dispute. Those issues concerning which there was a factual dispute were developed by means of oral testimony or documentation from other sources, much of which was in possession of the Hospital itself. The Hospital was in fact furnished all material and relevant documents it requested (H. Ptn. pp. 85a, 87a-88a; Appendix D hereof, below).

The Hospital had no right, constitutional or otherwise, to conduct a "fishing expedition" through the Board's confidential file. The cases cited at pp. 13-14 of its petition

21. This was the document being sought at the time the file was given to the Board's Labor Elections Supervisor while he was on the witness stand. (See H. Ptn. pp. 88a-89a.) The Hospital's assertion at pp. 8, 12 and 14 of its petition that the Labor Elections Supervisor improperly examined the file is wholly irrelevant to this application; it is not one of the grounds upon which a writ of certiorari is sought. (See H. Ptn. p. 3.)

do not support any such claim. To the contrary, this Court has expressly held otherwise. In *Gordon* v. *U.S.*, 344 U.S. 414, 419 (1953), the Court upheld a demand for the production of certain identified documents because it "* * * did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up." Accord, *Jencks* v. *U. S.*, 353 U.S. 657, 677 (1957).

The Hospital had only the right, which it exercised, to inquire whether specific documents were in the Board file and, if material and relevant, demand their production. *Jencks* v. *U. S.*, 353 U.S. 657, 659, 665-668 (1957). The Trial Examiner put the matter succinctly when, in denying the Hospital's request to examine "the entire file" he stated: "No, no more than Mr. Alfieri [the Board's litigation attorney] or Mrs. Vladeck [the Union's attorney] would have the right to go through your attache case—" (H. Ptn. pp. 85a-86a).

B. Use of the File

There is nothing in the record before this Court to substantiate the Hospital's unfounded and gratuitous assertions either that: (1) the Trial Examiner had possession of the Board's confidential file in the representation proceeding during the hearing on the election objections; or (2) that he used it as a basis for the recommended findings in his Intermediate Report (H. Ptn. pp. 3, 8, 11-16).

The excerpts from the transcript of the proceedings before the Board quoted at pp. 84a-97a of the Appendix to the Hospital's petition, and in Appendix D hereof, below, show clearly that the file was in the possession of the litiga-

tion attorney, not the Trial Examiner. An examination of the entire transcript shows that this was the case.

The Trial Examiner's Intermediate Report (H. Ptn. pp. 48a-80a) itself reveals that his recommended findings were based solely upon the evidence contained in the transcript of the formal record, and not upon any information culled from the Board's confidential file.[22] The Hospital has not pointed to a single recommended finding that is alleged to have been based upon material outside the formal record. Thus, there is no basis whatsoever for the Hospital's statement that the Trial Examiner's recommendations were based on information that is not a part of the "record" (H. Ptn. p. 8), or that he acted upon "secret" information (H. Ptn. pp. 3, 11, 12, 14).

Accordingly, the cases relied upon by the Hospital at pp. 14-16 of its petition have no relevancy to the issue now before this Court. To the extent that they are even remotely related, they all involved instances in which it clearly appeared from the record that the agency involved had in fact acted upon information that was not a part of the formal record of the proceeding. They did not involve a totally unsupported allegation that this might have occurred.[23]

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22. The case was not "decided" by the Trial Examiner, as erroneously stated at pp. 3 and 8 of the Hospital's petition. The Trial Examiner only "recommended" findings to the Board (H. Ptn. pp. 27a and 49a). The actual findings were made by the Board itself (H. Ptn. pp. 27a and 43a).

23. In *Garner* v. *Louisiana,* 368 U. S. 157, 173 (1961), relied upon at p. 15 of the Hospital's petition, it was the State while seeking to uphold a conviction, not the accused, that sought to have this Court find that the trial judge had taken "judicial notice" of certain information. Rejecting this contention, the Court said: "There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything." That is the situation here.

C. Conclusion

It is clear from the foregoing that no substantial issue under the "due process clause of the Fourteenth Amendment to the United States Constitution is presented by this record which warrants the granting of a writ of certiorari as requested at p. 3 of the Hospital's petition.

Conclusion

The petition for a writ of certiorari should be denied.

No genuine constitutional issue is raised by the twisted, distorted, convoluted and non-existent "facts" concocted by the Hospital in its petition. It has simply set up its own straw men to attack. It has not accurately represented to this Court the record and the findings below, which findings are not here reviewable.

Moreover, the Hospital has not cited a single controlling decision of this Court establishing that what actually occurred here in any way violated its rights under the Fourteenth Amendment to the United States Constitution. Merely "crying wolf" does not suffice to raise a substantial constitutional issue.

Manifestly the sole purpose of this petition is to perpetuate the long delay in fulfilling the Hospital's obligation to bargain collectively with the chosen representative of its skilled maintenance employees. Commencing with its initial attack upon the constitutionality of the "hospital" amendments to the New York State Labor Relations Act in

1963 and the jurisdiction of the Board, upon grounds different from those now before the Court,[24] the Hospital has opposed, disputed and litigated every action of, and finding by, the Board throughout this entire proceeding and over the past 11 years. Clearly the Hospital's primary purpose is to engage in litigation of every conceivable issue before every possible tribunal, regardless of the merits of its contentions either factually or legally.

These employees and their Union have been waiting since 1964 for effectuation of their collective bargaining rights under the New York State Labor Relations Act. They must not be required to wait still longer. Enough is enough!

Respectfully submitted,

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24. *The Long Island College Hospital*, 27 NYSLRB 405, 406-407 (1964).

APPENDICES

APPENDIX A

Excerpts from the Board's Decision in Wyckoff Heights Hospital, 27 SLRB 80-83

V. The Appropriate Unit

Local 144 and the Employer agree, in substance, that the appropriate unit should consist of the service and maintenance employees[17] (excluding administrators, supervisors, professionals, registered nurses, licensed practical nurses, pharmacists, office, clerical,[18] and technical employees). They disagree, however, as to certain miscellaneous positions, to be discussed below.

Maintenance Division seeks a unit limited to the employees of the engineer-maintenance department of the hospital.

This is the first decision in the series of hospital cases issued by us, since the amendment of our Act to include voluntary hospitals in which a separate unit of maintenance employees has been sought.

The Engineer-Maintenance Employees

The Employer's engineer-maintenance department is under the supervision of the chief engineer. There are also

17. Local 144 originally contended that the unit should also include office, clerical, and technical employees. By letter dated October 4, 1963, and received by the Board on October 7, 1963, Local 144 amended this position. It now agrees to a unit of service and maintenance employees in this, as well as all other pending proceedings in which it had taken a contrary position at the hearing. This conforms to the Board's recent holdings on this issue. (*Hayes Seventy-Third Corp. (Physicians Hospital)*, 26 SLRB 428, 430-431; *House of the Holy Comforter*, 26 SLRB 437, 438-440; *Flushing Hospital and Dispensary*, 26 SLRB 445, 446-447; *Yasuna, et al. (Mount Eden General Hospital)*, 26 SLRB 466, 468-469, and cases there cited.)

18. The receiving clerk and helper in the store's receiving department is essentially a stock clerk and, as such, is included in the unit. (*St. Clare's Hospital*, 26 SLRB 504, 505; *St. John's Queens Hospital*, 26 SLRB 529, 531).

an assistant to the chief engineer,[19] electricians, helpers, mechanics, painters, plumbers, plasterers, carpenters, masons, maintenance men, laborers, handymen, watch engineers, boiler room attendants, and stock clerk.[20]

In support of its unit contention, Maintenance Division argues that the engineer-maintenance department employees are a homogeneous group of skilled craftsmen[21] who have maintained their separate identity and thus may constitute a separate bargaining unit. There is no interchange of employees between this department and any other department in the hospital.[22]

As their very job titles indicate, the employees in this department are skilled men, who perform types of services identified with traditional trades and crafts, and who generally receive a higher rate of compensation. They have much more in common with one another than with the ordinary service employees, such as elevator operators, porters, maids, nurses' aides, laundry and kitchen workers.

19. The Employer contends that the assistant to the chief engineer should be excluded from any unit. In this department, only the chief engineer has authority to hire, fire or discipline employees, or to recommend such action. We find the assistant to the chief engineer has no supervisory functions, and he is included with the other engineer maintenance employees.

20. This stock clerk is in charge of the stock room in this department and dispenses materials to the maintenance employees. Although his duties are not clerical, he does not perform any of the skilled duties of other employees in the department. We find that his interests are allied to those of the service employees and we shall include him in the same unit.

All the parties agreed that the clerk-typist in this department be excluded from any unit.

21. Maintenance Division has not invoked the craft proviso of Section 705(2) of the Act. Thus, we are not called upon to determine whether the employees here involved constitute "a particular craft".

22. Two of the employees currently employed in this department were transferred from another department. These transferees were on a permanent basis and were considered promotions.

Appendix A

Maintenance Division and its predecessor, Building Maintenance Craftsmen of the Building and Construction Trades Council, A.F. of L., is an organization sponsored by, and affiliated with, Building and Construction Trades Council of New York City. Maintenance Division has many contracts with employers, other than hospitals, wherein it represents only the skilled maintenance employees, their helpers and assistants. It does not represent, or seek to represent, such service employees as elevator operators, porters, char women, etc.

Collective agreements between voluntary hospitals and unions, in the City of New York, generally have covered both service and maintenance employees. Maintenance Division has but one contract with a hospital (New York University Hospital) covering maintenance employees. Although Board decisions since the recent amendment of the Act have found service and maintenance units to be appropriate,[23] in none of those proceedings had any party sought a unit limited to maintenance employees. Prior to the amendment, if no union sought a smaller unit, we generally found a service and maintenance unit appropriate in proprietary hospitals.[24] However, in *Long Island Home Ltd.*, 21 SLRB 1, we found a maintenance unit appropriate, and we conducted a consent election for a maintenance unit in *Brunswick Home,* Case No. SE-28892. In non-hospital

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23. See, for example, *Flushing Hospital and Dispensary,* 26 SLRB 445, 446-447; *Knickerbocker Hospital,* 26 SLRB 569, 570; *Harlem Eye & Ear Hospital,* 26 SLRB 583, 584; *St. Barnabas Hospital For Chronic Diseases, et al.,* 26 SLRB 650, 653; *The New York Infirmary,* 27 SLRB No. 14.

24. See, for example, *McChesney (Adelphi Hospital),* 2 SLRB 266, 269-270, 3 SLRB 162; *Park West Foundation, Inc.,* 14 SLRB 536, 539.

cases, the Board frequently has found appropriate units limited to skilled maintenance employees.[25]

From the foregoing, it appears that there are weighty considerations in favor of, and opposed to, establishing a separate unit for the engineer-maintenance employees. On the one hand, they are a homogeneous group of skilled employees[26] having relatively higher earnings and no interchange with the service employees, as well as a history of bargaining in, and Board decisions establishing, separate units of skilled building maintenance employees in non-hospital cases. On the other hand, there is our policy against over-compartmentalization of hospitals into numerous small bargaining units,[27] and prior Board decisions (uncontested, to be sure) finding maintenance and service units appropriate in hospitals,[28] as well as some history of bargaining in the hospital industry whereby the maintenance employees have been included in the same unit as the service employees. We find that these factors are equally balanced. Under these circumstances, especially the fact that the engineer-maintenance employees performed types of services identified with traditional trades and crafts, we believe that the as yet unexpressed desires of these employees should be determinative. Accordingly, as we have done

25. See, for example, *London Terrace, Inc., et al.*, 5 SLRB 404, 406-407; *Two Park Avenue Building, Inc.*, 5 SLRB 1252, 1253-1256; *City Investing Company*, 6 SLRB 5, 7; *Paramount Broadway Corp., et al.*, 6 SLRB 42, 48-50; *Bergdorf & Goodman Company*, 6 SLRB 878, 880; *Salmon Management Company, Inc., et al.*, 10 SLRB 564, 565-567; *International Telephone Building Corporation*, 16 SLRB 674.

26. See *American Potash & Chemical Corporation*, 107 NLRB 1418, 1423-1424.

27. *St. John's Queens Hospital*, 26 SLRB 529, 532.

28. We have previously observed that a unit of service and maintenance employees is not immutable. (*Hayes Seventy-Third Corp. (Physicians Hospital)*, 26 SLRB 428, 431, and cases cited therein).

in similar situations,[29] we shall ascertain, by a self-determination election, the desires of the engineer-maintenance employees as to whether they prefer to bargain in a separate unit, or in a larger unit including the service employees. The procedure for holding such an election will be described more fully below, and our formal unit findings will await the outcome of that election.

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29. See, for example, *Buffalo General Laundries*, 2 SLRB 82, 83-84; *Sachs Quality Furniture, Inc.*, 1 SLRB 130, 134-135; *Hern Department Stores, Inc.*, 1 SLRB 318, 322; *Cadillac Motor Car Division, etc.*, 2 SLRB 317, 320; *Fox Square Laundry Co., Inc.*, 2 SLRB 632, 638; *Buffalo Baking Corporation*, 3 SLRB 646, 651; *Suburban Laundry Co.*, 4 SLRB 652, 660-661; *Tirana Realty Co., Inc.*, 5 SLRB 665, 668-669; *Bergdorf & Goodman Company*, 6 SLRB 878, 881; *Hotel Syracuse, Inc.*, 11 SLRB 181, 184-185; Board's *Report* (1937-1939), p. 149; Robert M. Benjamin, ADMINISTRATIVE ADJUDICATION IN NEW YORK STATE, Vol. V, Supplementary Report on The State Labor Relations Board (1942) pp. 149, 151.

APPENDIX B

Excerpts from the Hospital's Main Brief to the New York Court of Appeals

Argument

The Board's certification of Local 144 as exclusive bargaining representative of the Hospital's maintenance employees was invalid from the outset 35

1. A unit limited to the Hospital's maintenance employees is inappropriate 36

2. The Appellate Division erred when it failed to hold that the Board denied the Hospital procedural due process when it arbitrarily and capriciously processed the Maintenance Division's petition, in contravention of the Labor Board's own Rule 41 and its practice thereunder. Had the Board not processed that petition, it would not have directed a self-determination election 47

3. The Appellate Division erred in holding that the Labor Board's using a multi-question ballot for the maintenance employees was not arbitrary or inherently confusing. The ballot that the Labor Board forced the maintenance employees to use was itself sufficient reason for the Appellate Division to refuse to enforce the Labor Board's bargaining order, because the ballot (a) was in English only, (b) did not give the maintenance employees the opportunity to vote with respect to representation and unit placement by making a single mark on the ballot, and (c) was so complex, complicated and confusing that it deprived the maintenance employees of a proper opportunity to express their wishes regarding unit placement and union representation 51

4. The Appellate Division erred in upholding the way in which the Labor Board tallied the maintenance employees' ballots. That tally was contrary to the Labor Board's own Decision, Order and Direction of Elections and contrary to the Act. It should have tallied the ballots along with those of the service employees, inasmuch as a majority of the 47 maintenance employees voting in the election did not vote in favor of a separate unit of maintenance employees 58

Question Involved on the Hospital's Cross-Appeal

Was the Board's certification of Local 144 as the representative of a bargaining unit limited to 55 of the Hospital's 500 service and maintenance employees invalid, *ab initio,* because:

(a) such a balkanized unit is inappropriate for collective bargaining as both the Hospital and Local 144 contended; or

(b) the Board tallied the maintenance employees' ballots contrary to its Direction of Elections; or

(c) the Board's complex, complicated and confusing ballot prevented the maintenance employees from casting an intelligent vote in an election that Local 144 won by a *single* vote; or

(d) the balkanized unit and the confusing three question ballot were the result of the Board's violating its own rule 41, over the objection of both the Hospital *and* Local 144, in order to put on the ballot a second union that the Board had found was party to an illegal "deal" with Local 144?

The Appellate Division answered each part of this question "No."

APPENDIX C

Excerpts from the Hospital's Answering Brief to the New York Court of Appeals

Argument

I—The Labor Board acted arbitrarily, unreasonably, discriminatorily, without substantial evidence and contrary to law by refusing to set aside the election it conducted for the maintenance employees, notwithstanding Local 144's conduct before and on the day of the election that interfered with the maintenance employees' free choice of a bargaining representative. The Appellate Division correctly held that Local 144's Special Edition required the Labor Board to set aside the election. Hence it failed to pass on Local 144's other unlawful conduct that also warranted vacating the election 8

1. Mr. Ottley's Conduct 10
2. The Anonymous Letter 13
3. Local 144's "Special Edition" 15
   (a) Material misrepresentations of fact 21
   (b) Local 144 had special knowledge of the facts it misrepresented 28
   (c) Calculated circumstances precluded the Hospital from making an effective rebuttal 29
   (d) Impact on the electorate 34

II—The Labor Board committed prejudicial error when it denied the Hospital's motion to reopen the record 36

Appendix C

III—The Appellate Division had the duty to review all the Labor Board's actions in this proceeding and to set those actions aside if it found that they are not supported by substantial evidence. By its failure to set aside the Labor Board's bargaining unit determination, and to reject the Labor Board's complex, complicated and confusing ballot and unlawful method of counting the ballots, the Appellate Division mistakenly accepted the Labor Board's argument that its actions in these regards are beyond a court's review. This Court should correct the Appellate Division's error, and should set aside those actions of the Labor Board 40

IV—The Appellate Division correctly held that the Labor Board acted without substantial evidence and acted contrary to law in 1971 when it ordered the Hospital to bargain with Local 144, in view of Local 144's inordinate and deliberate delay in filing its unfair labor practice charge and the change in the composition of the bargaining unit while the Union was trying to oust the courts of their jurisdiction and deprive the Hospital of its day in court, all considered in light of Local 144's one-vote majority in the election, the complex, English-only ballot, the Labor Board's questionable tally of the ballots, the questionable appropriateness of the unit, Local 144's lies about wages and benefits on the eve of the election and its invasion of the polling area during the election, and the maintenance division's untimely intervention. All this was more than enough to compel the Appellate Division to annul the Labor Board's bargaining order even if the Appellate Division had not held that the Board erred when it certified Local 144 in 1964 51

Appendix C

Questions Involved on the Labor Board's and Local 144's Appeals

1. Was the Board's certification of Local 144 as the representative of a bargaining unit limited to 55 of the Hospital's 500 service and maintenance employees invalid, *ab initio,* because:

(a) Local 144 made material misrepresentations to the employees on the eve of the election about wages and benefits Local 144 claimed it negotiated at other hospitals, to which the Hospital could not reply; or

(b) Local 144's President invaded the voting area while the employees were voting, contrary to the Board's rules; or

(c) the Board's refusing to hold a hearing on the Hospital's Objections to the Election was discriminatory and deprived the Hospital of due process of law?

The Appellate Division answered part (a) of this question "Yes" and did not answer parts (b) and (c).

2. Even assuming the Board's certification was valid when it issued in 1964, is it stale today and unenforceable because:

(a) Local 144 abandoned it;

(b) Local 144 was guilty of laches and is estopped from asserting any rights under the certification;

(c) Local 144's efforts to proceed under Section 716 of the Act constituted an election of remedies; and

(d) only a miniscule number of the persons who were members of the unit at the time of certification were employees of the Hospital at the time of the Board order herein, and even fewer are employees today?

Appendix C

The Appellate Division seemed to answer parts (a), (b) and (c) of this question "Yes" and did not answer part (d).

3. Notwithstanding Local 144's four and one-half year delinquency in filing its charge, is the Board's remedy of a bargaining order today, rather than a new election, an abuse of discretion and punitive rather than remedial?

The Appellate Division seemed to answer this question "Yes."

4. Did the trial examiner err when he refused to permit Hospital counsel to inspect the Labor Board's confidential file on the case, although he had access to it and during the hearing took certain documents from it, either to introduce into evidence or for purposes of his examining witnesses?

The Appellate Division did not answer this question.

5. Did the Board commit prejudicial error when it denied the Hospital motion to reopen the hearing?

The Appellate Division did not answer this question.

APPENDIX D

Excerpts from Transcript of Record Before the Board (pp. 211-212)

Mr. D'Ablemont: The file has not been made accessible to me. I haven't seen any of the papers in the file.

Trial Examiner: You are not going to either.

Mr. D'Ablemont: How can I determine—

Trial Examiner: You already called for some papers and they were made available to you so you are able to identify them in any instance.

Mr. D'Ablemont: I didn't know where they came from. They were handed out to employees.

Trial Examiner: I think this witness testified that despite the fact that the original ballots were destroyed that there were probably copies of the sample ballots and the ballots used at the election in the Board's file. The Board's file was sent for and those papers were extracted and made available for your use during this hearing.

Mr. D'Ablemont: Was the Board's confidential file made available to counsel for the charging party?

Trial Examiner: I don't know.

Mrs. Vladeck: I have not requested it since I don't believe we are entitled to it.

Trial Examiner: I doubt that Mr. Alfieri would have shown that—that is for Mr. Alfieri to answer.

Mr. Alfieri: No, she has not.

FILED
FEB 15 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1081

THE LONG ISLAND COLLEGE HOSPITAL,

Petitioner,

against

NEW YORK STATE LABOR RELATIONS BOARD,

and

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED SERICE EMPLOYEES UNION, SEIU, AFL-CIO,

Respondents.

BRIEF OF RESPONDENT LOCAL 144 IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondents.

BRIEF OF RESPONDENT LOCAL 144 IN OPPOSITION TO PETITION FOR CERTIORARI

Statement of the Case

The Petitioner's statement of the case so distorts the facts and contains so many misrepresentations that the Court is respectfully urged to rely instead on the summary set forth in the Opinion of Chief Judge Fuld, writing for a unanimous Court of Appeals the decision for which review is sought by the Petition herein. For a fuller exposition of the facts, the Court is referred to the Find-

ings of Fact set forth in the Intermediate Report of the Trial Examiner (Appendix A; Appendix C 48a-77a).[1]

It is to be noted that the decision of the Court of Appeals and the prior decision of the Appellate Division were based upon the full record, including all of the Exhibits, of the proceedings before the Trial Examiner. Any inconsistencies between the facts as found by the Trial Examiner and the facts as the Hospital would have preferred to have them found were thus resolved by the State courts. Since the Court of Appeals adopted the facts as found by the Trial Examiner, it appears inappropriate for Petitioner to rewrite them here.

Argument

The Petitioner asserts that its constitutional rights have been denied in two respects.

(1) As to the first "issue presented," that of the procedures followed in the Labor Board hearing in which Petitioner was charged with refusal to bargain with Respondent Local 144 on behalf of the Hospital's maintenance department employees, for whom Local 144 was the certified representative, Petitioner erroneously casts the question in terms of its being "prosecuted," and having been denied fair hearing in a "trial." Petitioner apparently wishes, by its colorful choice of language, to transmute the administrative hearing, which it concedes was *in fact* a hearing on its objections to the election in which the Union had been designated as representative, into a quasi-criminal proceeding, thereby suggesting it was entitled to the application of different standards than

[1] References are to appendices to Petition.

those uniformly applied to representation cases before both the State and Federal agencies.[1]

Additionally, the Petitioner's argument on this question so misstates the "denial" to it of access to relevant material, as is apparent from its own references to the Record (Appendix F 84a-93a), that it should be summarily rejected as improperly brought before this Court.

(2) As to the argument that as a voluntary hospital, equal protection of the laws requires that Petitioner have its employees divided into the same bargaining units as those sometimes found appropriate in *private* (profit-making) hospitals, the absurdity of its position is matched only by its lack of respect for the meaning of the constitutional guarantee.[2]

Petitioner does not tell the Court that the Labor Board made the unit determination of which it complains while acting under the same statute that prohibits voluntary hospital workers from striking and picketing, while establishing no comparable restrictions on workers in *private* hospitals. Petitioner does not argue that the distinction between voluntary and private hospitals is violative of the standard of equal protection of the laws in that very fundamental distinction between employees of the two kinds of institutions.[3]

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[1] The Petition on p. 12 describes the hearing of which petitioner complains as a "hearing on its objections to the election . . ."

[2] Petitioner suggests, entirely inaccurately, that separate units of maintenance workers are uncommon or remarkable. Both the state and national Boards regularly find such units appropriate.

[3] Never in the prior stages in this litigation has the Hospital ever expressed any concern for possible constitutional infirmity in classification of voluntary hospitals resulting in restrictions imposed on their employees which arguably affect First Amendment rights; to the contrary Respondent Local 144's appeal to this Court in 1968 which argued that application of the statute imposed unconstitutional restraints on the employees of voluntary hospital was opposed by Petitioner. 23 N. Y. 2d 20 (1968), appeal dismissed 394 U. S. 716 (1969).

But, as to unit determinations, the Petitioner suggests that the statute unfairly classifies voluntary hospitals. This is, of course, factually erroneous in that the same standards for determining bargaining units are and were applied to all groups of employees under the state law. But even were there a distinction made by the Labor Board in units for voluntary hospitals, what would elevate such distinction to the level of a constitutional question?

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1081

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Petitioner,

against

NEW YORK STATE LABOR RELATIONS BOARD,

and

LOCAL 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED SERVICE EMPLOYEES UNION, SEIU, AFL-CIO,
Respondents.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

Argument

Point I—The Hospital's petition for a writ of certiorari satisfies the requirements of Rule 23(1)(f) 2

Point II—The Hospital vigorously argued substantial constitutional questions based on the Fourteenth Amendment in the Court of Appeals 5

Point III—Counsel for the Hospital has consistently maintained the position that a separate unit of maintenance employees is inappropriate for purposes of collective bargaining at non-profitmaking hospitals 7

Conclusion 8

TABLE OF AUTHORITIES

PAGE

Cases:

Brown v. Brown, 34 App. Div. 2d 727 (4th Dep't 1970) 4

Dodge v. Cornelius, 168 N.Y. 242, 61 N.E. 268 (1901) 4

Lawrence Hospital, 28 SLRB 552 (1965) 2

Maloney v. Hearst Hotels Corp., 274 N.Y. 106, 8 N.E. 2d 296 (1937) 4

Matter of Garfield, 14 N.Y.2d 251, 200 N.E.2d 196 (1964) 4

Society of the New York Hospital, 34 SLRB 486 (1971) 7

Sterrett v. Third National Bank of Buffalo, 122 N.Y. 659, 25 N.E. 913 (1898) 4

Wakeman v. Wilbur, 147 N.Y. 657, 42 N.E. 341 (1895) 4

Statute:

New York State Labor Relations Act, Labor Law, Section 707(2) (McKinney's 1965) 4, 5

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PETITIONER'S REPLY BRIEF

Petitioner, The Long Island College Hospital ("Hospital"), submits this brief pursuant to this Court's Rule 24(4) in reply to the arguments the New York State Labor Relations Board ("Labor Board") first raised in its brief in opposition to the Hospital's petition for a writ of certiorari.

ARGUMENT

POINT I

The Hospital's petition for a writ of certiorari satisfies the requirements of Rule 23(1)(f).

The Labor Board's allegation that the Hospital's petition fails to comply with Rule 23(1)(f) in that the petition fails to specify details as to time, place and manner in which the federal questions sought to be reviewed were raised is totally without merit.

On the contrary, the Hospital, by making its equal protection argument to the Labor Board's Trial Examiner at page 20 of its brief, preserved its right to have this Court review that argument. The Hospital's brief to the Trial Examiner was its first opportunity to raise this argument, which it made as follows:

> "Everyone agrees that a hospital is probably the most integrated of all operations. For this reason, the Board's stated policy is to avoid 'over-compartmentalization.'* The Board's ordering of a self-determination election for the non-professional maintenance employees of The Long Island College Hospital is patently inconsistent with that policy. * * *"

The footnote to the text quoted above cited *Lawrence Hospital*, 28 SLRB 552, 554 (1965), and concluded:

> "The facts of that case, involving a petition by BCTC [Building and Construction Trades Council], are fundamentally indistinguishable from the facts of the case herein and in the *Lawrence* case, the Board

dismissed the petition, *raising a question of denial of equal protection of the laws to The Long Island College Hospital.*" (Emphasis added).

This satisfied Rule 23(1)(f).

The Trial Examiner, the Labor Board, the Appellate Division and the New York Court of Appeals each rejected the Hospital's argument under the equal protection clause of the Fourteenth Amendment.

Petitioner also raised at the earliest possible moment its other constitutional argument that the Labor Board denied the Hospital due process of law when its Trial Examiner had access to and used secret information in the Labor Board's "confidential" file, while he denied the Hospital's counsel the right to examine that secret information. In fact, petitioner annexed to its petition for a writ of certiorari as Appendix F (84a-97a)[1] excerpts from the transcript of testimony at the hearing that show conclusively that petitioner's counsel vehemently objected whenever the Trial Examiner dipped into the Labor Board's confidential file and when he denied petitioner's counsel the "right to examine the Board's file which [petitioner's counsel] requested many times" (App. F 93a).

The Hospital submits that where, as here, its Statement of the Case specifies that the federal question was raised at the hearing before the Trial Examiner, that counsel raised the question by timely objection to the Trial Examiner's conduct, and that the Trial Examiner overruled the

1. References in parentheses are to appendices and page numbers in the Hospital's petition for certiorari.

objection, the Hospital has fully complied with the requirements of Rule 23(1)(f).

Moreover, if the Hospital had not raised the constitutional questions it asks this Court to review at the earliest possible moment neither the Appellate Division nor the New York Court of Appeals would have, or indeed, could have, reviewed the constitutional issues for the first time on appeal. *Matter of Garfield,* 14 N.Y.2d 251, 200 N.E.2d 196 (1964); *Maloney* v. *Hearst Hotels Corp.,* 274 N.Y. 106, 8 N.E.2d 296 (1937); *Dodge* v. *Cornelius,* 168 N.Y. 242, 61 N.E. 244 (1901); *Wakeman* v. *Wilbur,* 147 N.Y. 657, 42 N.E. 341 (1895); *Sterrett* v. *Third National Bank of Buffalo,* 122 N.Y. 659, 25 N.E. 913 (1890); *Brown* v. *Brown,* 34 App. Div. 2d 727 (4th Dep't 1970). Here both courts passed on the constitutional issues.

The Court of Appeals' Order granting the Hospital's motion to amend the remittitur[2] shows that the Hospital presented and the Court of Appeals considered and rejected the two constitutional questions now before this Court. Therefore, implicit in the Court's decision to amend its remittitur is the conclusion that the Hospital preserved its right to an appeal on these questions by raising them at the earliest possible moment at the hearing before the Trial Examiner, before the Labor Board, and before the Appellate Division.

The Labor Board mistakenly cites Section 707(2) of the New York Labor Law (McKinney's 1965) to support its transparent argument that the Supreme Court should

2. The Court of Appeals' Order granting petitioner's motion to amend its remittitur is annexed to the petition for certiorari as Appendix E (82a-83a).

not review the constitutional issues raised in the Hospital's petition. The Hospital stated at page 10 of its petition that it clearly and expressly raised and argued the two constitutional issues presented to this Court before the Appellate Division and before the Court of Appeals. Neither court rejected these arguments based on the statute the Labor Board now cites. Since the courts below found that the Hospital adequately preserved its right to appeal the constitutional issues the Labor Board decided adversely to the Hospital, Section 707(2) fails to support the Labor Board's argument based on Rule 23(1)(f).

POINT II

The Hospital vigorously argued substantial constitutional questions based on the Fourteenth Amendment in the Court of Appeals.

The Labor Board asks the Court to believe that "[t]he Fourteenth Amendment was never mentioned as an issue which the Hospital was tendering to the Court of Appeals for determination. * * *" (LBB p. 7).[3] However, examination of the Hospital's main and answering briefs to the Court of Appeals shows that the Labor Board misstates the facts and that, contrary to the Labor Board's assertion, the Hospital vigorously pressed its constitutional arguments before the Court of Appeals as it had before the Appellate Division and the Labor Board.

In its main brief to the Court of Appeals, the Hospital devoted *no less than five pages* (pp. 40-44) to its argument

3. LBB p.—, refers to pages of the Labor Board's brief in opposition to the Hospital's petition for a writ of certiorari.

that the Labor Board denied the Hospital equal protection of the laws by applying different unit standards to similar types of institutions. Likewise, the Hospital set forth its due process argument involving the Trial Examiner's improper use of the Labor Board's confidential file in two pages (pp. 50-51) of the Hospital's main brief and, because it considered the Trial Examiner's conduct so inimical to due process, it forcefully argued the constitutional argument again in its answering and reply brief (p. 50).

Where, as here, the Hospital devoted a total of 8 pages of argument in its briefs to the Court of Appeals to the constitutional questions raised herein, there can be no doubt that the Hospital presented those issues for serious consideration by the Court of Appeals and that the Labor Board's characterization of the Hospital's treatment of the constitutional questions as "tossed in for whatever they were worth" is totally unfounded.

Most significantly, the Court of Appeals obviously considered the Hospital's constitutional arguments "serious" and "substantial." It said so by granting the Hospital's motion to amend the remittitur, and by stating that "* * * there were presented to and passed upon questions under the Constitution of the United States * * *" (App. E 82a).

POINT III

Counsel for the Hospital has consistently maintained the position that a separate unit of maintenance employees is inappropriate for purposes of collective bargaining at non-profitmaking hospitals.

In the instant case, the Hospital argued at every stage of the proceedings that the Board's certification of Local 144 as the exclusive bargaining representative of the Hospital's maintenance employees was invalid from the outset because, *inter alia,* a unit limited to the Hospital's maintenance employees is inappropriate for purposes of collective bargaining. As the Labor Board candidly admits at page 10, footnote 8 of its brief, counsel for the Long Island College Hospital made the same argument in *Society of The New York Hospital,* 34 SLRB 486 (1971). The Labor Board is somehow "fascinated" by the fact that, although the Labor Board unconstitutionally has found units of skilled maintenance employees at other non-profitmaking hospitals appropriate, New York Hospital insists that a different unit, one not limited to maintenance employees, must be found appropriate there.

We submit that the Long Island College Hospital's equal protection argument is perfectly consistent with the position New York Hospital has taken. What the Labor Board fails to grasp is the fact that both the Long Island College Hospital and the New York Hospital have always contended that a separate unit of maintenance employees is inappropriate for the purposes of collective bargaining at non-profitmaking hospitals.

No one is "playing tiddly winks" as the Labor Board suggests. The Hospital is protesting the Labor Board's denial of the Hospital's constitutional rights. If the Labor Board regards the Constitution as a game, this is all the more reason to grant the writ.

Conclusion

This Court ought to grant a writ of certiorari to review the judgment of the New York Court of Appeals.

Respectfully submitted,

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